Supreme Court, U.S.
FILED
NOV 21 2001
OFFICE OF THE CLERK

No. 01-862

In The

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Appellant,

v.

JANET RENO, et al.,

Appellees.

On Appeal From A Three-Judge Panel Of The United States District Court For The District Of Columbia

JURISDICTIONAL STATEMENT ON BEHALF OF THE COMMONWEALTH OF VIRGINIA

MARK L. EARLEY
Attorney General of Virginia

RANDOLPH A. BEALES
Chief Deputy Attorney General

*FRANCIS S. FERGUSON
Deputy Attorney General

JAMES W. HOPPER
GREGORY E. LUCYK
Senior Assistant Attorneys General

A. ANN BERKEBILE
Assistant Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-2071

Counsel for Appellant

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

173pp

QUESTIONS PRESENTED

1. Did the District Court err in dismissing as unripe the Commonwealth of Virginia's request for a judgment declaring that Chapter 884 of the 2000 Va. Acts of Assembly ("Chapter 884") (1) is not covered by Section 5 of the Voting Rights Act, or (2) if covered, does not have a retrogressive purpose and effect, when it is indisputable that two types of Redistricting Data will be issued?

2. Whether Chapter 884, which codifies Virginia's historical practice of using population counts unadjusted by sampling in Congressional, state and local redistricting, does not amount to a change which would have required preclearance under Section 5 of the Voting Rights Act, or otherwise has no retrogressive effect as a matter of law, because it maintains the status quo?

3. Whether the Constitution and the Census Act prohibits the use of statistical sampling in the creation of data to be used for redistricting and, therefore, make it unnecessary for state statutes mandating the use of unadjusted Redistricting Data to be precleared under Section 5 of the Voting Rights Act?

4. Whether Chapter 884 has a retrogressive purpose?

LIST OF PARTIES TO THE PROCEEDINGS IN THE DISTRICT COURT

1. Appellant, the Commonwealth of Virginia.

2. Appellee, the United States of America.

3. Appellee Janet Reno, Attorney General of the United States.

4. Appellee Bill Lann Lee, Assistant Attorney General of the United States.

5. Appellee Intervenors Henry L. Marsh, III, individually and in his official capacity as a member of the Senate of Virginia; W. Henry Maxwell, individually and in his official capacity as a member of the Senate of Virginia; Richard L. Saslaw, individually and in his official capacity as a member of the Senate of Virginia; Mary Margaret Whipple, individually and in her official capacity as a member of the Senate of Virginia; Viola O. Baskerville, individually and in her official capacity as a member of the Virginia House of Delegates; C. Richard Cranwell, individually and in his official capacity as a member of the Virginia House of Delegates; Alan A. Diamonstein, individually and in his official capacity as a member of the Virginia House of Delegates; Jerrauld C. Jones, individually and in his official capacity of the Virginia House of Delegates; Kenneth R. Melvin, individually and in his official capacity as a member of the Virginia House of Delegates; Marian A. Van Landingham, individually and in her official capacity as a member of the Virginia House of Delegates (collectively referred to in the lower court as the "Legislator Intervenors").

LIST OF PARTIES TO THE PROCEEDINGS IN THE DISTRICT COURT – Continued

6. Appellee Intervenors the City of Los Angeles, California; the City of Richmond, Virginia; the City of Houston, Texas; the City and County of Denver, Colorado; the City of Inglewood, California; the City of Oakland, California; the County of Los Angeles, California; the City and County of San Francisco, California; the City of Stamford, Connecticut; the City of Dearborn, Michigan; the City of San Antonio, Texas; the County of Santa Clara, California; the County of Alameda, California; the County of San Bernardino, California; and the County of Dade, Florida (collectively referred to in the lower court as the "City Intervenors").

7. Appellee Intervenors the Virginia State Conference of the National Association for the Advancement of Colored People, Mr. Saad Al-Aziz, Ms. Annette Bryant, Mr. Charlie Bryant, Ms. Celestine W. Carter, Mr. Lawrence N. Day, Jr., Ms. Annette W. Gordon, Mr. Charles W. Howell, Ms. Melinease Hutchinson, Mr. Eugene W. Johnson, Mr. King Salim Khalfani, Ms. Odell M. McCluney, Ms. Ellen D. Pearson, Mr. William A. Smith, Ms. Carmen D. Taylor, Ms. Sandra C. Timmons, Ms. Sylvia C. Wood (collectively referred to in the lower court as the "NAACP Intervenors").

8. Appellee Intervenors George R. Smith, Curtis W. Harris, David P. Baugh (collectively referred to in the lower court as the "ACLU Intervenors").

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES vi

JURISDICTIONAL STATEMENT 1

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

ARGUMENT 6

I. The Questions Presented By This Appeal Are Substantial 6

A. This Appeal Involves Issues Which Must Be Resolved Promptly On Behalf Of All States 6

B. The District Court Failed To Apply The Correct Retrogression Analysis 7

C. The Relief Requested In This Appeal 8

II. The Bureau's Plan To Release Adjusted Redistricting Data Creates A Ripe Controversy 9

III. This Court Should Enter Judgment Declaring That Chapter 884 Is Enforceable 15

A. Chapter 884 Does Not Constitute A Change 16

B. Chapter 884 Is Not Covered By Section 5 Because The Use Of Enumerated And Unadjusted Population Counts In Redistricting Is Mandated By The Census Act And The Constitution Of The United States 18

TABLE OF CONTENTS – Continued

Page

1. The Census Act Requires That Enumerated Counts Be Used In Intrastate Congressional Redistricting/Reapportionment 18

(a) The Standing Of The Individual Plaintiffs In *DOC v. House* 18

(b) The Term "Apportionment" Subsumes "Redistricting" 20

(c) A Rational Interpretation Of The Census Act Supports The Conclusion That The Use Of Adjusted Population Counts In Redistricting Is Prohibited 23

2. The Constitution Prohibits The Use Of Statistically Adjusted Counts In Redistricting 24

(a) Congressional Redistricting 25

(i) Data Comparable To That Gathered In The "Actual Enumeration" Must Be Used For Congressional Redistricting ... 25

(ii) The Actual Enumeration Is Not An Estimate 26

(b) State Legislative and Local Redistricting 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 11, 12, 14

Board of Estimate of City of New York v. Morris, 489 U.S. 688 (1989) 28

Brown v. Walker, 161 U.S. 591 (1896) 26

Burns v. Gill, 316 F. Supp. 1285 (D. Haw. 1970) 22

Burns v. Richardson, 384 U.S. 73 (1966) 29

Commissioner of Internal Revenue v. Brown, 380 U.S. 563 (1965) 23

Davis v. Mann, 377 U.S. 678 (1964) 22

Department of Commerce v. United States House of Representatives, 525 U.S. 316, 119 S. Ct. 765 (1999) ....*passim*

Ely v. Klahr, 403 U.S. 108 (1971) 29

Gardner v. Toilet Goods Association, 387 U.S. 167 (1967) 12

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) 26

Glavin v. Clinton, 19 F. Supp. 2d 543 (E.D. Va. 1998) 18, 19

Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) 23

Hodel v. Indiana, 452 U.S. 314 (1981) 23

House of Representatives v. United States Department of Commerce, 11 F. Supp. 2d 76 (D.C. 1998) 18, 19

Karcher v. Daggett, 462 U.S. 725 (1983) 22, 28

Kirkpatrick v. Preisler, 394 U.S. 526 (1969) 24

Mahan v. Howell, 410 U.S. 315 (1973) 22, 28

TABLE OF AUTHORITIES – Continued

Page

Mitchell v. Forsyth, 472 U.S. 511 (1985) 15, 16

Nixon v. Fitzgerald, 457 U.S. 731 (1981) 15

Pennsylvania v. West Virginia, 262 U.S. 553 (1923) 13

Peterson v. Lindner, 765 F.2d 698 (7th Cir. 1985)..... 23

Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601 (1895) 26

Presley v. Etowah County Commission, 502 U.S. 491 (1992) 17

Prout v. Starr, 188 U.S. 537 (1903).....26, 29

Reno v. Bossier Parish, ___ U.S. ___, 120 S. Ct. 866 (2000) 7

Reynolds v. Sims, 377 U.S. 533 (1964) 28

Rogers v. Lodge, 458 U.S. 613 (1982) 28

Shaw v. Reno, 509 U.S. 630 (1993) 22

Taylor v. McKeithen, 499 F.2d 893 (5th Cir. 1974)..... 22

Texas v. United States, 523 U.S. 296 (1998) 11

Texas Rural Legal Aid, Inc. v. Legal Servs. Corp., 940 F.2d 685 (D.C. Cir. 1991)..... 22

Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568 (1985).....12, 15

Wesberry v. Sanders, 376 U.S. 1 (1964) 22, 25

Wisconsin v. City of New York, 517 U.S. 1 (1996) 23

Woodson v. Murdock, 89 U.S. 351 (1874).....26, 29

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const., Art. I, § 2 ..... 2, 24, 25, 26, 27, 28

U.S. Const. Fourteenth Amendment 2, 24, 28

STATUTES

13 U.S.C. § 141 2

13 U.S.C. § 195 2

28 U.S.C. § 2101 1

42 U.S.C. § 1973(c) 1, 2, 4

105 P.L. 119, 209(j), 111 Stat. 2440 ..... 2, 3

Va. Code § 24.2-301.1 ..... 4, 18

Va. Code § 24.2-304.1 ..... 4, 18

Va. Code § 24.2-309.1 5

2000 Va. Acts of Assembly, Ch. 884 ..... *passim*

Alaska Stat. § 15.10.200 (2000) 8

A.R.S. § 16-1103 (2000) 8

K.S.A. § 11-321 (1999) 8

REGULATIONS

15 C.F.R., part 101 ..... 2, 3, 9

OTHER AUTHORITIES

Census Bureau, Accuracy and Coverage Evaluation 10

TABLE OF AUTHORITIES – Continued

Page

Panel to Evaluate Alternative Census Methodologies, Preparing for the 2000 Census, *Interim Report II* (Andrew A. White and Keith F. Rust ed., 1997) 23

Samuel Johnson, A Dictionary of the English Language (1773) 27

John Walker, A Critical Pronouncing Dictionary (1794) 27

Thomas Sheridan, A General Dictionary of the English Language (1780) 27

Noah Webster, American Dictionary of the English Language (1828) 27

Barnhart Dictionary of Etymology (1988) 27

JURISDICTIONAL STATEMENT

The Commonwealth of Virginia ("Commonwealth") appeals from a final judgment of the three-judge United States District Court for the District of Columbia ("the District Court") dated October 17, 2000, dismissing Counts I, III and IV of the Commonwealth's Amended Complaint which sought a judgment declaring that 2000 Va. Acts ch. 884 either (1) does not need to be precleared pursuant to 42 U.S.C. § 1973c or, in the alternative, (2) is enforceable because it does not have a retrogressive purpose or effect. The District Court dismissed these Counts based upon its erroneous conclusion that they are not yet ripe.

OPINION BELOW

The October 17, 2000, opinion of the District Court appears in the Appendix to this Jurisdictional Statement ("J.S. App."). J.S. App. 1 is also available on LEXIS at 2000 Dist. LEXIS 15256. The District Court's order dismissing the Commonwealth's Complaint appears in J.S. App. 18.

JURISDICTION

The judgment dismissing Counts I, III, and IV of the Commonwealth's Amended Complaint was entered on October 17, 2000. The Commonwealth filed a Notice of Appeal to this Court on October 24, 2000, and an Amended Notice of Appeal (adding the Solicitor General, Attorney General Janet Reno and Assistant Attorney General Bill Lann Lee to the Certificate of Service) on November 1, 2000. (J.S. App. 19, 24) This appeal is being docketed within 60 days of the filing of the Notice of Appeal and Amended Notice of Appeal. The jurisdiction of this Court is invoked under 42 U.S.C. § 1973c and 28 U.S.C. § 2101.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 2 of the Constitution of the United States; the Equal Protection Clause of the Fourteenth Amendment; the Census Act as amended, 13 U.S.C. §§ 141 and 195; Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c; 105 P. L. 119, § 209(j), 111 Stat. 2440; 15 C.F.R. part 101; and 2000 Va. Acts of Assembly, Chapter 884 are reproduced at J.S. App. 30-45.

STATEMENT OF THE CASE

In the past, the Commonwealth and her localities have used population data generated by the United States Census Bureau (the "Bureau") for use by the states in redistricting (the Bureau's "Redistricting Data") when redrawing election districts in Virginia.[1] (J.S. App. 46, 53) The Bureau's Redistricting Data following previous decennial censuses was not adjusted through the use of statistical method known as "sampling" but, instead, was based upon actual population counts. The Bureau has now announced a dramatic change in its approach. Following the 2000 census, the Bureau plans to release as the

---

[1] The Commonwealth does not dispute that her localities have been authorized in the past to use something other than the Bureau's data when engaged in interim redistricting; however, they were always required to use the Bureau's data, which in the past has been unadjusted for decennial redistricting. The documents supporting this conclusion were attached as Exhibits 2 (with attachments thereto) and 3 to the Commonwealth's Memorandum Opposing Defendants' Motion to Dismiss or Stay and in Support of Plaintiff's Motion for Summary Judgment [hereinafter referred to as the "Commonwealth's Summary Judgment Memorandum"]. (J.S. App. 71) Only the Exhibits to the Commonwealth's Summary Judgment Memorandum which are essential to this appeal are included within the Appendix to this Jurisdictional Statement.

official "PL94-171 Redistricting Data," counts which have been adjusted by sampling – "[b]arring unanticipated operational difficulties."[2] (J.S. App. 50) The Bureau is also required by law to make unadjusted Redistricting Data available. *See* 105 P. L. 119, § 209(j), 111 Stat. 2440.

The United States Department of Commerce, of which the Bureau is a part, has now virtually ensured that population data adjusted by sampling *will be* released on or about April 1, 2001, by promulgating 15 C.F.R. part 101. Pursuant to 15 C.F.R. part 101.1(a)(1), the Secretary of Commerce has delegated the authority for making the final decision to release adjusted population counts as the PL94-171 Redistricting Data to the Bureau's Director, an undisputed advocate of the use of sampling to "correct" the census. This regulation also requires the "Executive Steering Committee for A.C.E. Policy" (the "Steering Committee"), made up of career census officials who have been actively involved in the statistical adjustment process and who, therefore, like the Director, have a vested interest in its validation, to prepare a written report to the Director recommending the methodology to be used in creating the PL94-171 Redistricting Data. *See* 15 C.F.R. part 101.1(b)(1). In the highly unlikely event that the Director decides that the adjusted counts should not be released as the PL94-171 Redistricting Data, 15 C.F.R. part 101.2(b) nevertheless provides that the data adjusted by sampling *shall be released* to the public if the Steering Committee recommends its release. Thus, *the only way* that adjusted data will not be released is if both the Director and the Steering Committee rule against it. The regulation's assurance that two different types of Redistricting Data will be released gives rise to a current and pressing legal issue regarding which of the two types

---

[2] "PL94-171 Redistricting Data" is a short-hand reference to the Redistricting Data released by the Bureau specifically for the use of states in redistricting.

of Redistricting Data should be used in intrastate redistricting.

Confronted for the first time with the imminent release of two different types of Redistricting Data, in its 2000 session the General Assembly enacted a new code provision (Va. Code § 24.2-301.1) and amended an existing statutory provision (Va. Code § 24.2-304.1) thereby mandating the continued use of Redistricting Data unadjusted by sampling for the purpose of redrawing the boundaries of Congressional, state legislative and local districts in Virginia. *See* 2000 Va. Acts ch. 884 [hereinafter referred to as "Chapter 884"]. (J.S. App. 42) This legislation was enacted to ensure the Commonwealth's compliance with the Constitution of the United States; to ensure the Commonwealth's compliance with Section 195 of the Census Act, as interpreted by this Court in *Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 119 S. Ct. 765, 773-75 (1999) [hereinafter referred to as *"DOC v. House"*]; to implement the most legally defendable method of redistricting; and to avoid or lessen the possibility of confusion, inaccuracies, errors, and legal action which would be likely to result from either (1) a change in the type of data used in Virginia's decennial redistricting or (2) the failure of the Commonwealth of Virginia to clarify by statute the type of data to be used in Virginia's decennial redistrictings. (J.S. App. 55-63)[3]

Virginia is one of only a few states holding odd year elections for state executive and legislative offices. Before state legislative elections can be held in Virginia next year, new election districts must be drawn and preclearance under 42 U.S.C. § 1973c [hereinafter referred to

---

[3] These excerpts from the Floor Debates of the Virginia House of Delegates and Senate were attached as part of Exhibits 9 and 10 to the Commonwealth's Summary Judgment Memorandum.

as "Section 5"] must be obtained in a compressed schedule necessary to accommodate candidate filings, nomination by primary or convention, and an election campaign, all before November of 2001. The Commonwealth filed suit in the District Court to resolve in advance, in accordance with Section 5's "pre-enforcement" scheme, any Section 5 questions about its database choice and thus avoid an eleventh hour invalidation of all districting plans because of their apportionment base. Specifically, the Commonwealth sought a judgment in the District Court declaring that (1) Chapter 884 is not subject to the preclearance requirements of Section 5 and, therefore, is enforceable; or (2) Chapter 884 does not have a retrogressive purpose or effect and, therefore, is enforceable.[4]

A three-judge District Court was impaneled to consider the Commonwealth's case. The United States Department of Justice ("DOJ") filed a motion to dismiss the Commonwealth's Amended Complaint or, in the alternative, a motion to stay consideration of the Commonwealth's claims until after the 2000 Redistricting Data is released by the Bureau. In addition, several persons, cities and organizations were granted leave to intervene.[5]

The Commonwealth opposed DOJ's motions to dismiss and to stay and moved for summary judgment. DOJ and all of the Intervenors filed responses to the Motion

---

[4] This declaratory relief was sought pursuant to Counts I, III and IV of the Commonwealth's Amended Complaint. The Commonwealth also sought and obtained a judgment preclearing Va. Code § 24.2-309.1 pursuant to Count V of her Amended Complaint. In addition, in Count II of the Amended Complaint, the Commonwealth sought a judgment declaring that the Department of Justice cannot lawfully rely upon population data adjusted by sampling when reviewing state redistricting plans in the future. The Commonwealth has not appealed the District Court's dismissal of Count II.

[5] See list of parties in the beginning of this Jurisdictional Statement.

for Summary Judgment. The District Court refused to consider the Commonwealth's Motion for Summary Judgment and, instead, on September 21, 2000, heard oral argument relating exclusively to DOJ's Motion to Dismiss.

Despite recognizing that the Bureau "has announced that it plans to release adjusted figures" for redistricting, the District Court erroneously concluded that the Commonwealth's claim was not ripe for its consideration because the Bureau, supposedly, "has not yet committed" to releasing Redistricting Data which has been adjusted by sampling. (J.S. App. 12) The District Court issued its Memorandum Opinion and Order dismissing the Commonwealth's case on October 17, 2000. This appeal follows.

ARGUMENT

I. The Questions Presented By This Appeal Are Substantial.

A. This Appeal Involves Issues Which Must Be Resolved Promptly On Behalf Of All States.

This case involves a dilemma currently faced by all of the states in our country, that is, determining *the legal, Constitutional and proper* type of population data to be used in redistricting. Because the Department of Commerce has now virtually ensured by regulation that the Bureau will release Redistricting Data which has been adjusted by sampling in the spring of 2001, states must decide whether to continue using unadjusted Redistricting Data or to change their redistricting process by using data which has been adjusted by sampling. The District Court apparently ignored or failed to recognize this fact when it noted that a determination regarding the purpose and effect of Chapter 884 will only need to be made "if and when the Census Bureau releases adjusted figures." (J.S. App. 11-12) The possibility that the Bureau will not

release the adjusted Redistricting Data, at the very least as some form of alternative Redistricting Data, is so remote and speculative that there simply is no "if and when" about it – both sets of Redistricting Data will be released in the spring of 2001 absent extraordinary and highly unlikely circumstances. Therefore, issues relating to the proper, legal and Constitutional type of data to be used in redistricting are ripe for judicial resolution *now.*

B. The District Court Failed To Apply The Correct Retrogression Analysis.

The imminent release of two types of Redistricting Data also reveals a crucial need for the Court to reemphasize the principles articulated in *Reno v. Bossier Parish,* ___ U.S. ___, 120 S. Ct. 866 (2000) [hereinafter *"Bossier Parish"].* The District Court erroneously concluded that it cannot yet determine, before and unless the adjusted population figures are released, whether Virginia's continued use of unadjusted population data in its redistricting process will cause "a retrogression in the position of racial minorities with respect to voting," an approach advocated by DOJ in the lower court. (J.S. App. 11, 70) This portion of the District Court's opinion misstates the proper retrogression analysis which should be applied when reviewing Chapter 884. To use a familiar phrase, the comparison should be of "apples to apples." This Court has instructed that the comparison is of old apples to new apples. *See Bossier Parish* ___ U.S. ___, 120 S. Ct. at 871-75 (The points of comparison, from prior to present, were emphasized by this Court in *Bossier Parish,* when the Court stated: "[a]s we have repeatedly noted, in vote-dilution cases § 5 prevents nothing but backsliding, and preclearance under § 5 affirms nothing but the absence of backsliding."). The District Court, however, has indicated that the Commonwealth must wait before seeking preclearance – so that the District Court or DOJ can compare new apples to new oranges – an improper analysis.

The Commonwealth has made use of unadjusted Redistricting Data for many years. While any population count, adjusted or unadjusted, will not achieve 100% accuracy, the Commonwealth's legislature sought in enacting Chapter 884 to make use of the most unadulterated data available. Members of the legislature recognized that where prior redistricting relied upon unadjusted Redistricting Data, the greatest assurance of avoiding any retrogressive effect was through the continued use of unadjusted Redistricting Data. They sought, to the extent possible, to maintain continuity in the electoral process. Where there is no change, there simply cannot be a retrogressive effect,[6] and the District Court's conclusion to the contrary, as reflected by its determination that "effect" cannot be determined until the adjusted data is released, must be rejected by this Court.

C. The Relief Requested In This Appeal.

Virginia is not the only state which will benefit from the Court's consideration of this appeal. Alaska, Arizona and Kansas have also enacted legislation requiring the use of unadjusted Redistricting Data and additional states are likely to elect to continue using the unadjusted Redistricting Data in the future. *See* ALASKA STAT. § 15.10.200 (2000); A.R.S. § 16-1103 (2000); K.S.A. § 11-321 (1999). At minimum, therefore, this Court should (1) note probable jurisdiction of the Commonwealth's appeal, (2) reverse the District Court's decision that the Commonwealth's action for preclearance is unripe because the effect of Chapter 884 cannot be determined until adjusted data is released, and (3) enter judgment as a matter of law declaring that Chapter 884 does not and cannot have a

---

[6] Such continuity also demonstrates a non-retrogressive purpose.

retrogressive effect – because it maintains the *status quo*.[7] Alternatively, it would be appropriate for this Court to enter judgment declaring that Chapter 884 does not constitute a change requiring preclearance. Either of these approaches will not only provide crucial assistance to the Commonwealth in meeting her goal of holding timely elections in 2001; it will also advise DOJ of the proper "apples to apples" analysis to be applied when considering decisions of the states to continue using unadjusted Redistricting Data.

In the alternative, the Commonwealth respectfully requests that the Court either (1) enter an order declaring that the Census Act and/or the Constitution precludes the use of sampling in the creation of data used for redistricting, or (2) promptly reverse the District Court's decision regarding ripeness and remand the case for expedited consideration of the Commonwealth's claims on the merits by a three-judge panel.

II. The Bureau's Plan To Release Adjusted Redistricting Data Creates A Ripe Controversy.

Due to the promulgation of 15 C.F.R. part 101, the possibility that two types of Redistricting Data will not be released has become almost non-existent. Moreover, even before this regulation became final, the Bureau made clear its intention to release adjusted data. Even the District Court recognized that it is the "plan" of the Bureau to release adjusted Redistricting Data and clearly erred when it refused to recognize that the Bureau's "plan" was

---

[7] Because the issue of purpose was fully briefed in the lower court, the Court could also enter a judgment declaring that Chapter 884 had no retrogressive purpose or, in the alternative, remand the case to the District Court for a prompt ruling regarding the purpose of Chapter 884. *See* Commonwealth's Summary Judgment Memorandum. (J.S. App. 121-124)

sufficient to create a controversy ripe for judicial resolution at this time.

The Bureau's consistent message has been that release of the adjusted data is *inevitable*. For instance, the Chief of the Census 2000 Data Office wrote to the Speaker of the Virginia House of Delegates, stating:

> To satisfy the requirements of Public Law 94-171 (copy enclosed), we will furnish you a copy of the Census 2000 Public Law (P.L.) 94-171 Redistricting Data file on CD-ROM(s) by April 1, 2001. *Barring unanticipated operational difficulties, these P.L. 94-171 Redistricting Data will reflect corrections for overcounts and undercounts as measured by the Accuracy and Coverage Evaluation.*

(Emphasis added) (J.S. App. 50)

In June of 2000, the Bureau published its *Accuracy and Coverage Evaluation*. In the Executive Summary on page one, the evaluation states:

> Because the Census Bureau expects it can produce more accurate data by supplementing traditional enumeration procedures with statistical sampling, it plans to use these statistical methods to produce the more detailed data required for redistricting and federal program purposes.

(J.S. App. 65) The inevitability of the Bureau's release of adjusted data is restated in the report's conclusion:

> *At the present time, the Census Bureau has also concluded that it is operationally feasible* to complete the A.C.E. and produce statistically corrected census data prior to April 1, 2001, and expects that the corrected data will be the most accurate data available.

(Emphasis added) (J.S. App. 66) Indeed, at a workshop on October 1, 2000, Bureau officials reported that the "operational" aspects of the A.C.E. have, for all intents and purposes, been completed.

In summary, "at the present time" the Bureau has "concluded that it is operationally feasible" to release adjusted data; the Bureau "plans" to release adjusted data; and the adjusted data will be released unless there are "*unanticipated operational difficulties.*"[8] Therefore, there is only a purely speculative and highly unlikely chance that the adjusted data will not be released.

Ripeness is not an absolute measure. In *Texas v. United States*, 523 U.S. 296 (1998), another preclearance case, the Court declined to review statutory provisions applying sanctions to school districts which did not meet state accreditation criteria. The Court stated: "Texas has not pointed to any school district in which the application of [statutory sanctions] *is currently foreseen or even likely.*" 523 U.S. at 296 (emphasis added). Thus, if an event is *foreseeable*, or is *likely to occur*, ripeness is satisfied. The release of adjusted Redistricting Data as well as Virginia's imminent enforcement of Chapter 884 in the spring of 2001 (by drawing its plans using unadjusted data) clearly meet these criteria.

The seminal case from this Court concerning ripeness is *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) [hereinafter "*Abbott*"]. In *Abbott*, the Court established a test for ascertaining the ripeness of a claim for declaratory relief which is based on two issues: (1) whether the issue is fit for judicial decision, and (2) the hardship to the parties of withholding court consideration.

An issue is fit for judicial decision if it is purely legal in nature. *Id.* at 149-50. The Commonwealth's claims that Chapter 884 is not subject to the preclearance requirements of Section 5 and that Chapter 884 does not have a retrogressive effect are clearly and exclusively legal in

---

[8] Again, such "operational difficulties" apparently did not occur because the A.C.E. has been completed.

nature and, therefore, satisfy the first requirement of the *Abbott* test.[9]

In addition, withholding the declaratory relief requested causes substantial hardship to the Commonwealth. The District Court suggested that nothing will prevent the Commonwealth from starting its process of redistricting, using the unadjusted data, following its release in the spring of 2001. This conclusion is directly contrary to the purpose of Section 5 – that is, allowing governmental entities to obtain a ruling regarding the enforceability of newly enacted statutes (or new practices) – before they go into effect. The District Court is actually forcing the Commonwealth to act at its own peril by risking violation of the law or, at the very least, prosecution by DOJ (or a legal challenge by a private citizen) for allegedly violating Section 5 by enforcing Chapter 884 – by drawing its plans – without first obtaining preclearance of Section 884.[10] It is this type of "Hobson's Choice" that the Section 5 preclearance process should help states avoid.

This Court has recognized that a "Hobson's Choice," such as that faced by the Commonwealth here, satisfies the "hardship" prong of the ripeness analysis. In *Gardner v. Toilet Goods Association*, 387 U.S. 167 (1967), the Court considered whether it should entertain a pre-enforcement action against the Commissioner of Food and Drugs on grounds that the Commissioner's regulations impermissibly expanded the reach of the applicable enabling statute.

---

[9] Although Count III of the Commonwealth's Amended Complaint arguably involves a factual issue – namely, the purpose of Chapter 884 – such issue is clearly ascertainable *now* and there is no benefit to be gained by waiting to consider it. *See Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 582 (1985).

[10] It is undisputed that the Appellees claim Chapter 884 to be subject to the preclearance requirements of Section 5.

Even though the Toilet Goods Association had not shown actual harm caused by the regulation, the Court determined that the action was ripe, in part, because of the "quandary" faced by the Toilet Goods Association. The Court reasoned:

> Faced with these regulations the respondents are placed in a quandary. On the one hand they can, as the Government suggests, refuse to comply [with the allegedly illegal regulation], continue to distribute products that they believe do not fall within the purview of the Act, and test the regulations by defending against government criminal, seizure, or injunctive suits against them. We agree with the respondents that this proposed avenue of review is beset with penalties and other impediments rendering it inadequate as a satisfactory alternative to the present declaratory judgment action.

Id. at 172. *See also Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923). Similarly, the Commonwealth should not be forced to face potential sanctions based upon its failure to preclear Chapter 884 before the General Assembly begins to draw redistricting plans.

The District Court's dismissal of the Commonwealth's claims has also placed into serious jeopardy the ability of the Commonwealth to hold timely legislative elections in November of 2001. (J.S. App. 128)[11] It must be emphasized that Virginia is one of only a few states holding odd year elections for state legislative offices. Before legislative elections can be held in Virginia next year, new election districts must be drawn and precleared in an expedited schedule necessary to accommodate candidate filings, nomination by primary or convention, and a campaign, all before the elections in November. If the

---

[11] This Affidavit was attached as Exhibit 1 to the Commonwealth's Summary Judgment Memorandum.

District Court's decision is not reversed, the Commonwealth will be faced with one more hurdle which must be crossed in an already onerous timeframe leading to the 2001 elections. Attorneys for the Commonwealth will be forced to seek a determination regarding the enforceability of Chapter 884 *while, at the same time,* Virginia's legislators will be drawing the new districts with data which could possibly be deemed illegal. If, in the spring or summer of 2001, DOJ and/or the District Court continue to refuse to preclear Chapter 884, the Commonwealth will then be forced to appeal that decision to this Court – by late spring or early summer of 2001 at the earliest. Throughout this entire time period, the Commonwealth will run the risk that the plans that Virginia's legislators will have drawn in the spring of 2001 will be invalidated and, perhaps, will ultimately be forced to begin the redistricting process anew – as late as in the fall of 2001. Thus, the likelihood of delays in the Commonwealth's 2001 legislative elections constitutes an additional aspect of the Commonwealth's hardship resulting from the withholding of a judicial determination relating to its claims.[12]

The Commonwealth's claims meet both the fitness and hardship prongs of the *Abbott* test. Moreover, because of the virtual certainty that two types of Redistricting Data will be released and that the adjusted data will be

---

[12] The District Court also appears to have accepted DOJ's argument in the lower court that the Commonwealth's enactment of legislation allowing for late primaries lessens its claimed hardship if prompt judicial resolution of the issues presented in the Amended Complaint is not obtained. Such is not the case. The mere fact that the General Assembly has added a degree of flexibility to the primary process in a redistricting year does not mean that the Commonwealth will not be harmed if the first hurdle in the preclearance process – obtaining a judicial determination regarding the enforceability of Chapter 884 – is delayed.

classified as the PL94-171 Redistricting Data used by DOJ in the preclearance process, the issues presented by the Commonwealth's Amended Complaint will have to be resolved at some point and nothing will be gained by a delay in resolving such issues. This is precisely the conclusion reached by this Court in *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), where the Court reasoned that "[n]othing would be gained by postponing a decision, and the public interest would be well served by a prompt resolution" of the matter. *Id.* at 582. Likewise, the public interest would be best served by a prompt resolution of the issues presented by the Commonwealth's Amended Complaint.

For all of these reasons, the Commonwealth respectfully requests that the Court note jurisdiction to the Commonwealth's appeal and reverse the District Court's decision regarding ripeness.

III. This Court Should Enter Judgment Declaring That Chapter 884 Is Enforceable.

The issues presented by Counts I and IV of the Commonwealth's Amended Complaint are purely legal in nature and are also very important. Therefore, these issues can and should be resolved promptly by this Court, particularly in light of the unique time pressures faced by the Commonwealth in 2001. *See Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985); *Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23 (1981). In *Nixon v. Fitzgerald, supra*, this Court considered whether the District of Columbia Court of Appeals had jurisdiction to consider former President Nixon's appeal of the District Court's denial of his motion to dismiss which had been based on the defense of absolute presidential immunity. The Court reversed the Court of Appeals decision that it lacked jurisdiction to consider Nixon's appeal and went on to rule that Nixon

was entitled to absolute immunity in a retaliatory discharge case. When reaching the merits of Nixon's defense, the Court reasoned as follows:

> Nor now that we have taken jurisdiction of the case, need we remand to the Court of Appeals for a decision on the merits. The immunity question is a pure issue of law appropriate for our immediate resolution. . . . [and] concerns of judicial economy fully warrant our decision of the important question presented.

Id. Accord Mitchell v. Forsyth, supra.

The same analysis applies here. The questions of whether Chapter 884 constitutes a change necessitating preclearance, whether the Census Act and/or the Constitution prohibits the use of sampling in the creation of data used for redistricting, and whether Chapter 884 can have no retrogressive effect because it merely maintains the *status quo* are all pure issues of law. They are also extremely important and time sensitive issues given the Bureau's imminent release of two types of Redistricting Data and the Commonwealth's need to obtain a prompt judicial ruling regarding the proper type of data to be used in redistricting as a prerequisite to holding timely legislative elections in 2001. Therefore, these issues can and should be resolved by this Court *now.*

Nevertheless, if the Court believes remand is appropriate to resolve the issues presented by Counts I and IV, the Commonwealth respectfully requests that such a determination be made promptly so that it can obtain a ruling from the District Court as expeditiously as possible.

A. Chapter 884 Does Not Constitute A Change.

Chapter 884 does not *in fact* change the Commonwealth's electoral process and, therefore, does not constitute a "change" in voting practices or process so as to require Section 5 preclearance prior to enforcement. This

Court has stated simply the test to evaluate whether a change has occurred which would require Section 5 preclearance:

> To determine whether there have been changes with respect to voting, we must compare the challenged *practices* with those in existence before they were adopted. Absent relevant intervening changes, the Act requires us to use *practices* in existence on November 1, 1964, as our standard of comparison.

Presley v. Etowah County Commission, 502 U.S. 491, 495 (1992) (emphasis added). The Court used the term "practices" to describe the electoral law in place in the jurisdiction. Consideration is not limited to statutory statements, but specifically is directed to the practices actually in existence. Thus, the argument made by Appellees in the District Court that the Commonwealth's legislators may have had "discretion" to use some other form of data in past redistrictings is wholly irrelevant to the issue presented by the Commonwealth's Count I because the *practice* in Virginia has always been to use enumerated, actual counts – not statistical estimates.

There is no dispute that the Commonwealth historically has used Redistricting Data which has not been adjusted by statistical sampling, provided every ten years by the Bureau, in drafting its plans for congressional, state legislative and local redistricting. Chapter 884 simply requires the continued use of Redistricting Data unadjusted by sampling. It does not involve any new or changed electoral process. On the contrary, Chapter 884 codifies the process that has been in effect for years, and was in effect as of November 1, 1964.[13]

---

[13] The Commonwealth does not deny that that "actual enumeration" which it has used in the past contained certain "corrections"; however, these modifications were always based on known facts rather than statistically manufactured by

Thus, the change is not in the Commonwealth, in its electoral process, or in the application of its law; the change is with the Bureau. In the absence of a change in the Commonwealth's electoral process, Section 5 preclearance is not required and the Commonwealth respectfully requests that the Court enter a judgment *at this time* declaring that it may enforce Va. Code § 24.2-301.1 and the amendment to Va. Code § 24.2-304.1 without the approval of the DOJ or the District Court.

B. Chapter 884 Is Not Covered By Section 5 Because The Use Of Enumerated And Unadjusted Population Counts In Redistricting Is Mandated By The Census Act And The Constitution Of the United States.

1. The Census Act Requires That Enumerated Counts Be Used In Intrastate Congressional Redistricting/Reapportionment.

(a) The Standing Of The Individual Plaintiffs In *DOC v. House*.

DOC v. House involved two separate cases that were consolidated on appeal. One of these cases was initially filed by the United States House of Representatives in the District of Columbia District Court. *House of Representatives v. United States Department of Commerce*, 11 F. Supp. 2d 76 (D.C. 1998). The other case, *Glavin v. Clinton*, 19 F. Supp. 2d 543 (E.D. Va. 1998), was filed by several individual residents/citizens of varying states [hereinafter referred to as "the Glavin Plaintiffs"] in the United States District Court for the Eastern District of Virginia. The plaintiffs in both lawsuits challenged the use of data *adjusted via sampling* in the congressional reapportionment process. Both District Courts concluded

---

sampling and the 2001 unadjusted Redistricting Data will have similar corrections based upon known facts.

that the Census Act prohibited the use of population counts adjusted by sampling in congressional reapportionment. *Glavin v. Clinton*, 19 F. Supp. 2d at 553; *House of Representatives v. United States Department of Commerce*, 11 F. Supp. 2d at 104.

This Court affirmed the Virginia district court's conclusion that the Glavin Plaintiffs had standing to pursue their claims for two reasons: (1) the "virtual certainty" that Indiana, the resident state of certain plaintiff(s), would lose a seat as a result of a sample-based adjustment of the 2000 census; *and* (2) "the expected effects of the use of sampling on ***intrastate redistricting***" (emphasis added). *DOC v. House*, 525 U.S. 316, 119 S. Ct. at 773-75.[14] Justice O'Connor also reasoned that voters, such as the Glavin Plaintiffs, who live in areas that receive a low adjustment or no adjustment "will be injured by the [plan to use adjusted population counts for intrastate redistricting] because their votes will be diluted vis-à-vis residents of counties with larger 'under-count' rates." *Id.*

The Court affirmed the lower court's holding that the Census Act prohibited the use of adjusted population counts in the congressional apportionment process and,

---

[14] Interestingly, even though the case involved the interpretation of the Census Act, which would presumably only apply to congressional reapportionment/redistricting, when concluding that the Glavin Plaintiffs had standing to pursue their claims because of the "injuries" that they were likely to suffer if adjusted population counts were used in redistricting, the Court considered not only the effect of the use of adjusted data in the congressional redistricting process but also considered the use of such data in state legislative redistricting. *DOC v. House*, 525 U.S. 316, 119 S. Ct. at 774-75 (noting that "several of the States in which . . . [the Glavin Plaintiffs] are located require the use of federal decennial census population numbers for their state legislative redistricting").

in so ruling, concluded that *in order to redress the Appellees' injuries,* it was unnecessary to reach the Constitutional issues raised by the Appellees (including the Glavin Plaintiffs). *Id.* The Court did not indicate that it did not intend to redress *all* of the injuries claimed by the Glavin Plaintiffs in the case – including their claim of likely injury if adjusted numbers were used in intrastate redistricting. There was simply no need for the Court to even discuss the Appellees' second basis for standing, that is, "the expected effects of the use of sampling on intrastate redistricting," *unless* the Court intended to reach the *redistricting component* of the reapportionment process *as well as* the allocation of seats among the states. Therefore, in holding that "the Census Act prohibits the proposed uses of statistical sampling in calculating the population for purposes of apportionment," it is clear that this Court intended that "redistricting" be included within the Census Act's prohibition against the use of statistically adjusted data in the "apportionment" process. *See* 525 U.S. at ___, 119 S. Ct. at 775.

(b) The Term "Apportionment" Subsumes "Redistricting."

That this Court interprets the Census Act to preclude the use of Redistricting Data adjusted by statistical sampling in intrastate redistricting when stating that sampling could not be used "for apportionment purposes" is further supported by the internal use of the term "apportionment" within the *DOC v. House* decision. For example, in *DOC v. House,* the Court refers to the Census Act's prohibition against the "uses" of statistically adjusted data for "purposes" of apportionment. 119 S. Ct. at 777-79 (emphasis added). If the Court viewed the Census Act as precluding the use of adjusted data *only* in the process of determining the number of representatives to which each state is entitled, there would have been no need for this constant use of the plural.

Justice O'Connor's discussion of the 1957 and 1976 amendments to the Census Act also confirms that the Court considers "apportionment" to include "redistricting." This Court noted that the 1957 amendments authorized the Secretary of Commerce to use sampling when gathering certain "nonapportionment census information regarding population" but clearly "did not authorize the use of sampling procedures in connection with apportionment of Representatives." 525 U.S. at ___, 119 S. Ct. at 776. Justice O'Connor then went on to acknowledge that the 1976 amendments changed the 1957 law by requiring, when feasible, that the Secretary use sampling when gathering nonapportionment population information but concluded that the Census Act "maintains its prohibition on the use of statistical sampling in calculating population for purposes of apportionment." 525 U.S. at ___, 119 S. Ct. at 777. The Court also recognized that

> [a]t no point during the debates over these amendments did a single Member of Congress suggest that the amendments would so fundamentally change the manner in which the Bureau could calculate the population for purposes of apportionment. . . . This is true despite the fact that such a change would profoundly affect Congress by likely shifting the number of seats apportioned to some States *and altering district lines in many others.*

525 U.S. at ___, 119 S. Ct. at 779 (emphasis added) (citations omitted). This observation of a lack of Congressional comment regarding the likely shift in the number of seats *apportioned* to some states *and* the likely alteration of *"district lines"* if the use of statistically adjusted data was permitted in the redistricting process by the 1976 amendments to the Census Act further reflects the Court's inclusion of redistricting in the definition of the term "apportionment" throughout the *DOC v. House* opinion.

The historical use of the term "apportionment" by this Court, lower courts and legislative bodies also supports the conclusion that this Court meant to include "redistricting" when referring to "apportionment" in *DOC v. House* and that Congress intended to preclude the use of statistically adjusted population counts in intrastate congressional redistricting pursuant to § 195 of the Census Act. Throughout the development of this Court's reapportionment jurisprudence, the Court has consistently used the term "apportionment" to include districting by directly and unequivocally referring to the drawing of district boundaries as "apportionment." *See, e.g., Shaw v. Reno*, 509 U.S. 630, 634 (1993); *Karcher v. Daggett*, 462 U.S. 725, 727 (1983); *Mahan v. Howell*, 410 U.S. 315, 321 (1973); *Wesberry v. Sanders*, 376 U.S. 1, 4 (1964); *Davis v. Mann*, 377 U.S. 678, 680 (1964).[15]

Numerous lower Federal Court cases also reflect that the common usage of the term "reapportionment" incorporates "redistricting." *See, e.g., Texas Rural Legal Aid, Inc. v. Legal Servs. Corp.*, 940 F.2d 685, 688 (D.C. Cir. 1991); *Taylor v. McKeithen*, 499 F.2d 893, 910-11 (5th Cir. 1974); *Burns v. Gill*, 316 F. Supp. 1285, 1293 (D. Haw. 1970).[16] In addition, the overwhelming majority of states currently use some form of the term "apportionment" in their statutes or Constitutional provisions dealing with the drawing of representative districts.[17]

Because the courts and states have consistently used the term "apportionment" to include "redistricting" when discussing or referring to redistricting plans, it is clear that this Court intended to interpret the Census Act to prohibit the use of statistically adjusted population counts in intrastate redistricting in *DOC v. House*. It is also correct to conclude that Congress, by using the term

---

[15] For additional authorities see J.S. App. 101-103.

[16] For additional authorities see J.S. App. 103.

[17] *See* J.S. App. 104-105.

"apportionment" in § 195 of the Census Act, intended to prohibit the use of adjusted data in the congressional redistricting process. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988).

(c) A Rational Interpretation Of The Census Act Supports The Conclusion That The Use Of Adjusted Population Counts In Redistricting is Prohibited.

"The mathematics of sampling and estimation are such that . . . the level of sampling error, relative to the size of the population counted, will increase as one moves to smaller and smaller geographical units." PANEL TO EVALUATE ALTERNATIVE CENSUS METHODOLOGIES, PREPARING FOR THE 2000 CENSUS, *Interim Report II*, (Andrew A. White and Keith F. Rust ed., 1997) 11 (J.S. App. 67). As one moves down the geographic hierarchy – from regions – to entire states – to counties and cities – to smaller geographic areas such as precincts and census blocks, the numbers are likely to become less and less accurate. It is for this reason, among others, that the Secretary of the Department of Commerce rejected the option of using statistical sampling following the 1990 census. This Court validated the Secretary's concerns in this regard in *Wisconsin v. City of New York*, 517 U.S. 1, 11 (1996).

Due to increased levels of inaccuracy as the sample size decreases, it would have been irrational for Congress to have authorized the use of Redistricting Data adjusted through the use of statistical sampling in intrastate redistricting while at the same time prohibiting the use of statistically adjusted data for allocating Representatives among the states. Surely, Congress did not intend such an absurd result when it enacted legislation authorizing the use of sampling for certain limited purposes. *See Peterson v. Lindner*, 765 F.2d 698, 705 (7th Cir. 1985) (citing *Hodel v. Indiana*, 452 U.S. 314, 322 (1981)); *Commissioner of Internal*

Revenue v. Brown, 380 U.S. 563, 571 (1965) (courts presume the Congress enacted rational legislation).[18]

It is undisputed that the Appellees disagree with the conclusion that the Census Act prohibits sampling in the creation of Redistricting Data and, therefore, a controversy exists between the parties with respect to this issue. Furthermore, the question of whether the Census Act precludes the use of sampling in the creation of the population data to be used by the states in redistricting is a pure issue of law which can and should be decided now for the reasons explained above.

2. The Constitution Prohibits The Use Of Statistically Adjusted Counts In Redistricting.

In contending that the Constitution requires the use of "actually enumerated" data in intrastate redistricting, the Commonwealth does not intend to imply that the Constitution requires the states and localities to use population data prepared by the Bureau in the process of redistricting.[19] This Court has never, however, indicated that something other than the population data generated in an "actual Enumeration" (unadjusted by sampling) will be used as a litmus test when reviewing congressional, state or locality redistricting plans to determine whether they meet the equality of representation requirements of Article 1, § 2, cl. 3 and the Equal Protection

---

[18] It would also be unreasonable to require the Commonwealth to use statistically adjusted population counts in its state legislative and local reapportionment/redistricting process when it is legally prohibited from using the same type of data for federal redistricting.

[19] Although *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), would appear to suggest otherwise, at least with respect to congressional redistricting. 394 U.S. at 534.

Clause. This Court also has never indicated that statistically manufactured data, created *via* sampling, is a permissible population base for use in districting. Therefore, the United States should not be permitted, through use of the Section 5 review process or through the release of adjusted "PL94-171 Redistricting Data," to require the Commonwealth to use something other than unadjusted Redistricting Data – actual enumeration results – when redistricting in Virginia.

(a) Congressional Redistricting.

(i) Data Comparable To That Gathered In The "Actual Enumeration" Must Be Used For Congressional Redistricting.

In *Wesberry v. Sanders*, 376 U.S. 1 (1964) [hereinafter "*Wesberry*"], the Supreme Court recognized the Constitutional mandate imposed upon the States to create congressional districts which, to the extent possible, ensure equality in the voting strength of all voters – that is, districts which ensure "one person, one vote." *Id.* at 18. In reaching this conclusion, the Court interpreted clauses 1 and 3 of Article I, § 2 of the Constitution together rather than construing the phrase "apportioned among the several States . . . according to their respective numbers" as applying only to the number of Representatives to which each State is entitled. The Court specifically acknowledged that the "apportionment" clause in Article I, § 2 reflects the intent of the Framers that congressional districts within the states are to be drawn to ensure equality in voting strength. A practical, reasonable and harmonious construction of all of the clauses in Article I, § 2 also leads to the conclusion that the "respective numbers" referred to in Article I, § 2, cl. 3, and considered by this Court when determining whether or not a state's congressional districts provide for "one man, one vote," must

also be defined by Article I, § 2 – that is, they must be based upon data comparable to the "actual enumeration" required by clause 3 of Article I, § 2. *See Prout v. Starr*, 188 U.S. 537, 543 (1903) ("The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity"); *Brown v. Walker;* 161 U.S. 591, 595-96 (1896) (recognizing that the Court must construe the Constitution's privilege against self-incrimination in a "practical" manner so that the privilege does not completely obstruct the administration of criminal justice); *Woodson v. Murdock*, 89 U.S. 351, 368-69 (1874) ("every clause in every constitution" must be given "a reasonable interpretation").

(ii) The Actual Enumeration Is Not An Estimate.

The statistically adjusted population counts which the Bureau intends to release as its PL94-171 Redistricting Data by April of 2001 stand in contrast to the Constitution's simple requirement that representation is to be based upon an "actual Enumeration" which "count[s] . . . the whole number of persons." U.S. Const. Article I, § 2. Where, as here, the language of the Constitution is clear, this Court has consistently held that the plain language of the Constitution must be given effect and may not be contravened. *See Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 618 (1895); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824). Because the phrase "actual enumeration" is quite straightforward and conducive to simple understanding, such is the construction which it should be given.

The plain meaning of the "actual enumeration" referred to in Article I, § 2 was unambiguous at the time of the drafting of the Constitution. In 1789, "enumerate" meant to "count" and plainly did not mean to estimate.

See, e.g., Samuel Johnson, A Dictionary of the English Language (1773); John Walker, A Critical Pronouncing Dictionary (1794); Thomas Sheridan, A General Dictionary of the English Language (1780); Noah Webster, American Dictionary of the English Language (1828). Both "enumerate" and "enumeration" derive from the Latin word "enumerare" which means to "count out." Barnhart Dictionary of Etymology (1988). Indeed, the word "count" is often defined as "enumerate." *See* Noah Webster, American Dictionary of the English Language (defining the word "count" to mean "to tell or name one by one, or by groups, for the purpose of ascertaining the whole number of units in a collection; to number; to enumerate").

Moreover, earlier decisions from this Court support the conclusion that the "actual Enumeration" required by the Constitution must be, in essence, a headcount of actual persons rather than a statistical estimate of state populations created *via* sampling – and with good reason. As recognized by Justice Scalia in his concurrence in *DOC v. House*, to construe Article I, § 2 so as "[t]o give Congress the power, under the guise of regulating the 'Manner' by which the census is taken, to select among various estimation techniques" would lead to the very real and "not happy" prospect that Courts will be called upon to "review[ ] estimation techniques in the future." *DOC v. House*, 525 U.S. at 349, 119 S. Ct. at 779-82 (J. Scalia concurring). At least three other justices of this Court appear to share this valid concern (Chief Justice Rehnquist and Justices Kennedy and Thomas joined Justice Scalia in this portion of his concurrence). *Id.*

Furthermore, to date, every case from the Court dealing with the principle of equality in voting strength has been based upon enumerated data unadjusted by sampling. In fact, the Court has specifically refused to consider the estimated "undercount" when determining

whether a state's congressional redistricting plan fulfilled the requirement of "one man, one vote." *Karcher v. Daggett*, 462 U.S. 725, 738-39 (1983).

In summary, the Constitution requires data comparable to that which is gathered in the "actual enumeration" to be used, not only for determining the number of Representatives to which each state is entitled, but also in the process of intrastate, congressional redistricting. Furthermore, the "actual enumeration" required by Article I, § 2 constitutes an actual count of the population rather than a statistical estimate which is subject to manipulation. Because the Constitution requires the states to use enumerated population counts, unadjusted by statistical sampling, in their congressional redistricting process, the Commonwealth's statute codifying this Constitutional requirement should not be subject to Section 5 preclearance.

(b) State Legislative and Local Redistricting.

This Court has also held, based upon the Equal Protection Clause of the Fourteenth Amendment to the Constitution, that "the basic constitutional principle [of] equality of population among the districts" applies to the process of state legislative and local redistricting. *Mahan v. Howell*, 410 U.S. 315, 321 (1973) (citing *Reynolds v. Sims*, 377 U.S. 533 (1964)). *See also Board of Estimate of City of New York v. Morris*, 489 U.S. 688 (1989); *Rogers v. Lodge*, 458 U.S. 613 (1982). A reasonable, logical and consistent construction of Article I, § 2, together with the Fourteenth Amendment's Equal Protection Clause, also supports the conclusion that population counts comparable to that obtained in the "actual enumeration" must be used when redrawing the boundaries of state legislative and local

governmental districts.[20] *See Prout v. Starr*, 188 U.S. at 543; *Woodson v. Murdock*, 89 U.S. at 368-69. Therefore, Virginia's requirement that unadjusted data be used in state legislative and locality redistricting should not be subject to Section 5 review.[21]

---

[20] When arguing that the Constitution requires enumerated data, unadjusted by sampling, to be used in the state and local redistricting process, the Commonwealth does not intend to imply that states are required to use the data provided by the Bureau in redistricting. This Court has indicated in several cases that states may be allowed to rely upon population counts other than those provided by the Bureau in the process of state legislative redistricting. *See Burns v. Richardson*, 384 U.S. 73 (1966); *Ely v. Klahr*, 403 U.S. 108 (1971). However, the Court has only expressed a willingness to approve plans based upon alternative population counts when the results were not substantially different from the population deviations which would have occurred through the use of total population counts (at that time unadjusted through statistical sampling) provided by the Bureau.

[21] For additional authorities see J.S. App. 117-121.

CONCLUSION

The Court should note jurisdiction of this appeal and reverse the judgment of the District Court. This Court should also award the declaratory relief requested in this appeal or, in the alternative, remand the case to the District Court for prompt resolution of the Commonwealth's claims.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

MARK L. EARLEY
Attorney General of Virginia

RANDOLPH A. BEALES
Chief Deputy Attorney General

*FRANCIS S. FERGUSON
Deputy Attorney General

JAMES W. HOPPER
Senior Assistant Attorney General

GREGORY E. LUCYK
Senior Assistant Attorney General

A. ANN BERKEBILE
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
(804) 786-2071

Counsel for Appellant

**Counsel of Record*

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMONWEALTH OF VIRGINIA, Plaintiff, v. JANET RENO, et al., Defendants.	Civil Action 00-00751 Three-Judge Court (HHK, ESH, JWR)

MEMORANDUM OPINION

(Filed Oct. 17, 2000)

This is an action for declaratory judgment brought by the Commonwealth of Virginia under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1994) ("Section 5").[1] *See also* 28 U.S.C. §§ 2201, 2284 (1994). Virginia seeks a declaratory judgment concerning recent revisions to the Virginia Election Code, enacted as 2000 Va. Acts ch. 884 ("Chapter 884"). Chapter 884 directs the legislature to use unadjusted population counts provided by the Bureau of the Census when redrawing congressional, state Senate, and state House of Delegates districts. *See* Va. Code Ann. § 24.2-301.1 (2000). In addition, Chapter 884 mandates the use of unadjusted figures when reapportioning representation in the governing bodies of Virginia's counties, cities, and towns. *See* Va. Code Ann.

[1] The three-judge court was convened pursuant to 28 U.S.C. § 2284 by orders of July 19 and 24, 2000.

§ 24.2-304.1 (2000). Finally, Chapter 884 provides additional time for Virginia's localities to create or modify precincts, following the Census Bureau's release of census data. *See* Va. Code Ann. § 24.2-309.1 (2000).

Virginia presents three major claims in its Amended Complaint of May 18, 2000. First, Virginia argues that Chapter 884 does not require Section 5 preclearance because (1) the Census Act, 13 U.S.C. § 195 (1990), and the United States Constitution require the use of unadjusted figures and (2) Virginia's "continued" use of unadjusted figures does not constitute a "change" in redistricting practices within the meaning of Section 5. Amended Complaint ¶¶ 17-20. Second, Virginia claims that, even if preclearance is required, Chapter 884 was not implemented with the purpose – nor would it have the effect – of "retrogression." *Id.* ¶¶ 24-29. Finally, Virginia challenges the decision of Attorney General Reno to use adjusted figures in Department of Justice preclearance evaluations as being in violation of the Census Act and the Constitution. *Id.* ¶¶ 21-22.

On June 19, 2000, the United States filed a motion to dismiss the Amended Complaint without prejudice, under Fed. R. Civ. P. 12(b)(1), or to stay the proceedings, on the ground that Virginia's claims are not yet ripe. *See Memorandum in Support of Defendant's Motion to Dismiss or Stay Proceedings ("Motion to Dismiss").* On June 30, 2000, Virginia filed an opposition to the United States' motion and a motion for summary judgment, which the United States opposed. *See Memorandum Opposing Defendants' Motion to Dismiss or Stay and in Support of Plaintiff's Motion for Summary Judgment ("Opposition to Motion to Dismiss"); Reply Memorandum in Support of United States'*

Motion to Dismiss or Stay Proceedings ("Reply Memorandum"). The court heard argument on the United States' motion to dismiss on September 21, 2000.

Upon review of the pleadings and arguments of counsel, the court grants the United States' motion to dismiss as to counts I, II, III, and IV of the Amended Complaint. As to count V, because the United States does not oppose preclearance of Va. Code § 24.2-309.1, we grant judgment to Virginia.

I.

Article I, Section 2, Clause 3 of the United States Constitution requires a decennial census of the population. Data from this census are used to calculate state population totals for congressional apportionment. *See* U.S. Const. art. I, § 2, cl. 3. To this end, the Census Act requires the Secretary of Commerce to report state population totals from Census 2000 to the President within nine months of the census date, i.e., by January 1, 2001. *See* 13 U.S.C. § 141(b) (1990). In addition to this constitutional purpose, the data from Census 2000 are used by states (including the Commonwealth of Virginia) to draw boundaries for state and local legislative bodies. *See Opposition to Motion to Dismiss* at 4-5. The Census Act requires the Census Bureau in the Commerce Department to report this block-level data for use in state redistricting directly to the states "within one year after the decennial census date," i.e., by April 1, 2001. 13 U.S.C. § 141(c) (1990).

Studies by the Census Bureau demonstrate that each census has produced a net undercount of the population

and shown a higher "differential undercount" for ethnic and racial minorities and children. *See* U.S. Department of Commerce, Bureau of the Census, Accuracy and Coverage Evaluation: Statement on the Feasibility of Using Statistical Methods to Improve the Accuracy of Census 2000 (2000) at 4-7 ("Feasibility Statement"). To increase the accuracy of the census, the Census Bureau has developed a series of statistical methods that correct for these differential undercounts and generate "adjusted" census figures. The Census Bureau's "adjustment" practice, however, has prompted debate and criticism, resulting in several limitations on the Census Bureau's authority to release statistically adjusted figures for the 2000 Census. First, Congress has directed that, if the Census Bureau releases adjusted figures in satisfaction of its § 141 obligations, it must also release a companion set of block-level, unadjusted population data. *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 209(j), 111 Stat. 2440, 2483 (1997). Second, in *Department of Commerce v. United States House of Representatives*, 525 U.S. 316 (1999), the Supreme Court recently held that the Census Act prohibits the use of adjusted data for constitutionally-mandated congressional apportionment. *Id.* at 343.

Following the decision in *Department of Commerce*, the Census Bureau announced that it has not yet determined whether to release adjusted data for purposes of state redistricting under § 141(c).[2] *See* Feasibility Statement at

---

[2] In its Motion to Dismiss, the United States notes that, on June 13, 2000, the Department of Commerce proposed a

52. The Census Bureau intends to conduct an Accuracy Coverage Evaluation ("A.C.E."), which "is designed to correct for missed individuals or erroneous enumerations in the traditional enumeration." *Id.* at 1. After the A.C.E. is completed, the Census Bureau will conduct a thorough review of its quality and methodology. *See id.* at 52. In testimony before Congress in May 2000, the Director of the Census Bureau stated that while the Bureau "currently expects that the corrected numbers using [sampling] will be the more accurate numbers," it will not release adjusted data if it "does not have confidence in the [sampled] results." Prepared Testimony of Kenneth Prewitt, Director, U.S. Bureau of the Census, Before the Subcommittee on the Census, Committee on Government Reform, U.S. House of Representatives (May 19, 2000), *available at* 2000 WL 668026.

In the 2000 Session of the Virginia General Assembly, Virginia enacted Chapter 884. Chapter 884 amends § 24.2-304.1 to state in pertinent part:

> § 24.2-304.1. At-large and district elections; reapportionment of districts or wards; limits.
>
> * * *
>
> C. For the purposes of reapportioning representation in 2001 and every ten years thereafter, the governing body of a county, city, or town shall use the most recent decennial population

---

regulation providing in part that the "Director of the Census shall make the final determination regarding the methodology to be used in calculating the tabulations of population reported to States and localities pursuant to 13 U.S.C. 141(c)." *Motion to Dismiss* at 9-10.

> figures . . . from the United States Bureau of the Census, which figures are identical to those from the actual enumeration conducted by the United States Bureau of the Census for the apportionment of representatives in the United States House of Representatives. . . .

In addition, Chapter 884 adds the following provision to the Virginia Election Code:

> § 24.2-301.1. Reapportionment of congressional and state legislative districts; United States Census population counts. For the purposes of redrawing the boundaries of the congressional, state Senate, and House of Delegates districts . . . the General Assembly shall use the population data provided by the . . . Bureau of the Census identical to those from the actual enumeration conducted by the Bureau for the apportionment of the Representatives of the United States House of Representatives. . . .

Finally, Chapter 884 amends § 24.2-309.1 to grant localities additional time to change and/or create voting precincts.[3]

Virginia is a jurisdiction covered by the preclearance requirements of Section 5 of the Voting Rights Act. As

---

[3] Specifically, Va. Code § 24.2-309.1, as amended, provides in relevant part:

> No county, city, or town shall create, divide, abolish, or consolidate any precincts, or otherwise change the boundaries of any precinct, effective during the period from September 1, 1998, to May 15, 2001. . . .

The prior version of the statute prohibited localities from redrawing precinct boundaries from September 1, 1998 until June 1, 2001. *See Opposition to Motion to Dismiss* at 9.

such, it is prohibited from enacting any change in "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," without obtaining either judicial preclearance from the United States District Court for the District of Columbia or administrative preclearance from the Attorney General. *See* 42 U.S.C. §§ 1973c, 1973b(a), (b).

II.

Virginia seeks a declaratory judgment on five counts. Count I claims that Virginia is not required to obtain Section 5 preclearance concerning Chapter 884 because (1) the Census Act and the United States Constitution require Virginia to use unadjusted data and (2) Virginia's "continued" use of unadjusted figures does not constitute a "change" within the meaning of Section 5. Amended Complaint ¶¶ 17-18, 20. Count II alleges that the Attorney General's plan to use adjusted figures when evaluating redistricting submissions under Section 5 violates the Census Act and is unconstitutional.[4] *Id.* ¶¶ 21-22. Counts

---

[4] As evidence that the Department of Justice plans to use adjusted data in its preclearance review, Virginia submits a March 24, 1990 letter to the Governor and Attorney General of Arizona from the Acting Chief of the Department of Justice's Voting Section stating in pertinent part that:

> it is the consistent practice of [the Department of Justice] in evaluating submissions under Section 5 . . . to analyze redistricting plans using the data designated by the Bureau of the Census for redistricting pursuant to PL 94-171. . . . Thus, the Attorney General's review and assessment of any redistricting plan under Section 5 will not be restricted by [a state's] redistricting process.

III and IV allege that Virginia did not enact Chapter 884 with a retrogressive purpose, nor will the statutes have a retrogressive effect within the meaning of Section 5. *Id.* ¶¶ 24-29. Count V alleges that Va. Code § 24.2-309.1, extending the time for localities to draw voting precincts, does not have a retrogressive purpose or effect within the meaning of Section 5. *Id.* ¶¶ 32-35.

In support of its motion to dismiss the complaint as unripe, the United States argues that "Virginia's essential goal – to prevent statistically adjusted 2000 Census population data from being used for state redistricting – will be meaningful only if statistically adjusted data are released by the Census Bureau." *Motion to Dismiss* at 13. Because the Census Bureau has not yet decided to release adjusted data, Virginia's dispute relies on a contingent future event, not an established fact. Further, "assuming [that] adjusted data are released, the effect of preventing [the] use of those data cannot now be known." *Id.* at 14. It follows, in the view of the United States, that "the central factual premise of Virginia's case for preclearance of Chapter 884 – that the ban on the use of statistically adjusted census data for redistricting will not have a retrogressive effect under Section 5 – necessarily is speculative. . . . " *Id.* Regarding count II, the United States argues, alternatively, that Virginia's attempt to challenge the Attorney General's decision to use adjusted data, if

---

Opposition to Motion to Dismiss, Exhibit 8 at Exhibit C. *See Opposition to Motion to Dismiss* at 12. In this letter, however, the Department of Justice also stated that it "consider[s] other demographic and election data in these analyses." *Opposition to Motion to Dismiss*, Exhibit 8 at Exhibit C.

available, in Section 5 preclearances is nonjusticable [sic]. *See id.* at 37. As to count V, the United States does not oppose the preclearance of § 24.2-309.1. *See id.* at 2 n.3 & 15 n.12.

In opposing the dismissal of its amended complaint, Virginia argues that count I presents pure questions of law: (1) whether Chapter 884 amounts to a "change" in Virginia law that requires preclearance under Section 5, and (2) whether the Constitution and the Census Act mandate the use of actual census figures. *See Opposition to Motion to Dismiss* at 3. Further, relying on its past practice of using the actual enumeration, Virginia argues that the relief sought for counts III and IV is not dependent on the type of data that the Census Bureau releases for the 2000 Census. Virginia claims that the court need only determine whether the enumeration requirements of Chapter 884 are retrogressive in purpose or effect. To make this determination, Virginia argues, the court need only refer to the actual enumeration provided by the Census Bureau in the past, as required by *Reno v. Bossier Parish School Board*, 120 S. Ct. 866, 875 (2000). *See Opposition to Motion to Dismiss* at 3, 18, 41. Moreover, Virginia references the Census Bureau's stated plans as evidence that "it is a virtual certainty that the Bureau's official, 2001 PL 94-171 Redistricting data will be adjusted through the use of statistical sampling." *Opposition to Motion to Dismiss* at 6. In support of this assertion, Virginia refers to a March 1, 2000 letter to the Speaker of the Virginia House of Delegates from the Chief of the Census 2000 Data Office. This letter, Virginia claims, makes clear that the discretionary decisions regarding whether to engage in statistical sampling have been made and only operational questions

remain. *See id.* at 13. Finally, Virginia claims that by not receiving the census data before April 1, 2001, its ability promptly to redistrict is impeded because it will receive the data "significantly later" than it has in the past. *Id.* at 6.

A.

As a threshold matter, the court must address the jurisdictional question of ripeness. *See Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43 (1993). *See also Texas v. United States*, 523 U.S. 296 (1998); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998). As the Supreme Court has stated, the ripeness doctrine "is drawn from both Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Catholic Soc. Servs.*, 509 U.S. at 57 n.18. Article III confines federal courts to adjudicating "actual, ongoing cases or controversies." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). *See also Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 579 (1985). Moreover, "prudential" ripeness reflects the "court's interests in avoiding unnecessary adjudication and in deciding issues in a concrete setting." *Grand Canyon Air Tour Coalition v. Fed. Aviation Admin.*, 154 F.3d 455, 472 (D.C. Cir. 1998) (*quoting Florida Power & Light Co. v. EPA*, 145 F.3d 1414, 1421 (D.C. Cir. 1998)). In evaluating the "prudential" ripeness of a claim, a court must consider "the fitness of the issues for judicial decision" and the "hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). To determine whether a claim is fit for judicial decision, a court evaluates "whether the issue is '(a) essentially legal, and (b) sufficiently final.' " *Consol.*

Rail Corp. v. United States, 896 F.2d 574, 577 (D.C. Cir. 1990) (citation omitted). *See also Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 163-64 (1967). To satisfy the "hardship" prong of *Abbott Laboratories*, a court must look to the "degree and nature of the regulation's present effect on those seeking relief," *Toilet Goods*, 387 U.S. at 164, and conclude that "the impact of the regulation[ ] upon the petitioners is sufficiently direct and immediate as to render the issue appropriate for judicial review at this time." *Abbott Labs.*, 387 U.S. at 152.

Assuming that Chapter 884 is subject to preclearance under Section 5, Virginia must demonstrate that the statutes "[do] not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. . . . " 42 U.S.C. § 1973c. Virginia would have the burden of persuasion on both points. *See Bossier Parish Sch. Bd.*, 120 S. Ct. at 871-72. As to counts III and IV, Virginia argues that if Section 5 applies, Chapter 884 satisfies this standard. *See Opposition to Motion to Dismiss* at 41-44.

Even were it possible for the court to arrive at a factual determination of the "purpose" of Chapter 884, the statutes' "effect" could depend on contextual factors that are not yet certain. To evaluate Virginia's legislation under Section 5, the court would have to decide if the difference between actual and adjusted figures is of significance, and whether redistricting using actual figures could be considered a "retrogression in the position of racial minorities with respect to [voting]." *Beer v. United States*, 425 U.S. 130, 141 (1976). *See also Bossier Parish Sch. Bd.*, 120 S. Ct. at 872. This analysis need only be conducted if and when the Census Bureau releases adjusted

figures. If the Census Bureau does not release adjusted data, Chapter 884 will have no practical effect, and this court would not need to grapple with the issue of whether to define retrogression in terms of adjusted figures.

Although the Census Bureau has announced that it plans to release adjusted figures, it has not yet committed to doing so. Rather, the Census Bureau has stated that it will make its final decision on whether to release adjusted data after it evaluates the quality and accuracy of the A.C.E. process. *See* Feasibility Statement at 52-54. This situation is markedly different from *Department of Commerce*, where there was a final decision by the Census Bureau to use sampling in conducting the enumeration for congressional apportionment. *See Dep't of Commerce*, 525 U.S. at 320; *United States House of Representatives v. Dep't of Commerce*, 11 F.Supp.2d 76 (D.D.C. 1998). By contrast, the circumstances that Virginia presents in counts III and IV are a textbook example of a claim that is not ripe for adjudication. Notwithstanding Virginia's insistence that the release of adjusted figures is a virtual certainty, this argument relies upon "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Thomas*, 473 U.S. at 580-81 (*quoting* 13A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3532 (1984)). Hence, absent the existence and release of adjusted population figures, Virginia's claims fail to satisfy Article III and the fitness prong of *Abbott Laboratories*.

Furthermore, Virginia has not satisfied the "hardship" prong of the *Abbott Laboratories* ripeness inquiry. In evaluating whether a claimant has asserted adequate

"hardship," a court must evaluate whether " 'the interests of the court and agency in postponing review until the question arises in some more concrete and final form [are] outweighed by the interest of those who seek relief from the challenged action's immediate and practical impact upon them.' " *Aulenback, Inc. v. Fed. Highway Admin.*, 103 F.3d 156, 166-67 (D.C. Cir. 1996) (*quoting Continental Air Lines, Inc. v. Civil Aeronautics Bd.*, 522 F.2d 107, 125 (D.C. Cir. 1975) (en banc)). Virginia argues that "withholding judicial review would impose irreparable hardship on the people" of Virginia, because the state is operating under a "compressed schedule" in preparation for the 2001 elections. *Opposition to Motion to Dismiss* at 1-2. In support of its hardship claim, Virginia relies on the June 27, 2000 affidavit of Cameron Quinn, the Secretary of the State Board of Elections for Virginia. In his [sic] affidavit, Mr. [sic] Quinn states that if the court delays a determination of the enforceability of Chapter 884 until the Spring of 2001, "it will be virtually impossible for timely elections to proceed in Virginia in November of 2001." *Opposition to Motion to Dismiss*, Exhibit 1 at 3.

Yet, as the United States points out, Virginia has recently enacted a statute that allows the State Board of Elections to reschedule primaries "if it appears that the necessary 2001 reapportionment or redistricting will not be completed, and preclearance from the appropriate United States authority under Section 5 . . . will not be received in time. . . . " 2000 Va. Acts ch. 886 (2000). *See Reply Memorandum* at 5-6. Moreover, the United States argues, there is nothing to prevent Virginia from redistricting on the basis of actual figures, as it claims it has consistently done in the past. *See Motion to Dismiss* at 25;

Opposition to Motion to Dismiss at 18. If Virginia is correct that Chapter 884 does not trigger Section 5 preclearance, or, alternatively, that Chapter 884 merits preclearance, then the future release of adjusted figures will not affect Virginia's redistricting plan. In addition, the Census Bureau and the Department of Justice have announced their intention to expedite proceedings for states that must meet redistricting deadlines. The Census Bureau has stated that it "will, as in the past, release the numbers from Census 2000 to the states as they are ready, giving priority to states that need to meet early deadlines." Feasibility Statement at 14. At the September 21st hearing, the Department of Justice stated that it plans to expedite Section 5 review for Virginia and other states holding elections in 2001.

B.

Virginia also presents several constitutional and statutory claims that purport to be independent from the substance of the preclearance dispute. Count I alleges that Chapter 884 is not subject to Section 5 preclearance because (1) the Census Act and the United States Constitution require the use of actual figures, and (2) Virginia's "continued" use of actual figures does not constitute a "change" within the meaning of Section 5. Count II alleges that the Attorney General's plan to use adjusted figures in preclearance evaluations is unconstitutional and violates the Census Act. Neither of these claims, however, is ripe.

Virginia argues that count I presents pure questions of statutory and constitutional interpretation that are not

contingent on the Census Bureau's release of adjusted data. *See Opposition to Motion to Dismiss* at 2-3. Moreover, Virginia contended at the hearing that the court must determine at this time the substantive issue of Section 5 coverage, because absent Section 5 applicability, the court lacks jurisdiction.

While Virginia is correct that count I presents questions of law, the relevance of these claims – and the ultimate need for their adjudication – depends entirely on the Census Bureau's release of adjusted population data. Until the Census Bureau decides which census figures to release, a judicial ruling on these questions of law would respond to an "abstract disagreement [ ]" that may never materialize. *Abbott Labs.*, 387 U.S. at 148. Indeed, if the Census Bureau releases only actual figures, there may well be no dispute between the parties regarding Chapter 884, and any ruling by the court now on the issues raised by count I would become an advisory opinion prohibited under Article III. *Lewis*, 494 U.S. at 477. For these reasons, ripeness considerations preclude our review of count I at this time.

Having concluded that count I is not ripe for judicial consideration, the court need not reach the substance of Virginia's Section 5 coverage claim. Once a court determines that a claim is unripe, it has satisfied its obligation to make a threshold determination concerning jurisdiction. *See Catholic Soc. Servs.*, 509 U.S. at 57-58 (1993). In *Texas*, for example, the Supreme Court upheld a district court's dismissal of similar claims of Section 5 inapplicability on the ground that the dispute was not ripe for adjudication. *See Texas*, 523 U.S. at 299-302. Similarly, in *Ohio Forestry Association v. Sierra Club*, 523 U.S. 726, 732

(1998), the Supreme Court ordered the dismissal of claims on the ground that they did not satisfy the threshold requirement of ripeness and therefore were not justiciable. In other words, the court abides by the "usually unspoken element of the rationale underlying the ripeness doctrine: If we do not decide it now, we may never need to. . . . Article III courts should not make decisions unless they have to." *Nat'l Treasury Employees Union v. United States*, 101 F.3d 1423, 1431 (D.C. Cir. 1996).

As is true for counts I, III, and IV, count II is also not ripe. Its existence and significance depend solely upon the Census Bureau's release of adjusted figures; this contingent future event does not point to an actual, justiciable controversy. Because count II fails to satisfy the ripeness requirement, we do not reach the United States' alternative argument, citing *Morris v. Gressette*, 432 U.S. 491 (1977), that count II is nonjusticiable. *See Motion to Dismiss* at 35-37 & n.33.

Accordingly, we hold that counts I, II, III, and IV are not ripe for review by the court at this time. Until the Census Bureau releases adjusted figures, the court need not consider Virginia's claims, for ripeness considerations preclude the court from deciding either the legal issues in counts I and II or the factual claims in counts III and IV. We therefore grant the United States' Rule 12(b)(1) motion and dismiss, without prejudice, counts I, II, III,

and IV, and, in the absence of objection by the United States, we grant judgment for Virginia on count V.

HENRY H. KENNEDY JR.
United States District Judge

ELLEN S. HUVELLE
United States District Judge

/s/ Judith W. Rogers
JUDITH W. ROGERS
United States Circuit Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMONWEALTH OF VIRGINIA,
Plaintiff,
v.
JANET RENO, et al.,
Defendants.

Civil Action 00-00751
Three-Judge Court
(HHK, ESH, JWR)

JUDGMENT

(Filed Oct. 17, 2000)

For the reasons stated by the court in its Memorandum docketed this same day, it is this 17th day of October, 2000, hereby

ORDERED and ADJUDGED that counts I, II, III, and IV of the complaint are **DISMISSED** without prejudice; and it is further

ORDERED and ADJUDGED that Va. Code § 24.2-309.1 is precleared as sought by the Commonwealth of Virginia in count V of its complaint.

/s/ Henry H. Kennedy, Jr.
Henry H. Kennedy, Jr.
United States District Judge

/s/ Ellen S. Huvelle
Ellen S. Huvelle
United States District Judge

/s/ Judith W. Rogers
Judith W. Rogers
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

COMMONWEALTH OF VIRGINIA, **Plaintiff,** **v.** **UNITED STATES OF AMERICA, *et al.*** **Defendants.**	**CASE NUMBER: 1:00CV00751** **JUDGE: HENRY H. KENNEDY** **DECK TYPE: THREE JUDGE COURT (HHK, ESH, , VR)**

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the plaintiff, Commonwealth of Virginia ("the Commonwealth"), by counsel, as authorized by 42 U.S.C. § 1973c and Rule 18.1 of the Rules of the Supreme Court of the United States, hereby appeals to the United States Supreme Court from the Order entered in the above-referenced action on October 17, 2000, by the United States District Court for the District of Columbia, sitting as a district court of three judges. The Commonwealth is appealing from the Order of the District Court dated October 17, 2000, to the extent that it dismisses Counts I, III and IV of the Commonwealth's Amended Complaint. These Counts of the Commonwealth's Amended Complaint seek a judgment declaring that 2000 Va. Acts ch. 884 either (1) does not need to be precleared pursuant to 42 U.S.C. § 1973c or, in the alternative, (2) is enforceable because it does not have a retrogressive purpose or effect. The District Court

dismissed these Counts based upon its conclusion that they are not yet ripe.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

By: /s/ Frank S. Ferguson
Counsel

Mark L. Earley
Attorney General of Virginia

Randolph A. Beales
Chief Deputy Attorney General
Virginia State Bar No.: 27055

Frank S. Ferguson
Deputy Attorney General
Virginia State Bar No.: 17843

James W. Hopper
Senior Assistant Attorney General
District of Columbia Bar No.: 387719

Gregory E. Lucyk
Senior Assistant Attorney General
Virginia State Bar No.: 19754

A. Ann Berkebile
Assistant Attorney General
Virginia State Bar No.: 31901

E. Scott Moore
Assistant Attorney General
Virginia State Bar No.: 36045

Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-2071

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Notice of Appeal was served on the 20th day of October 2000, by first class mail, postage prepaid to:

Counsel for Defendant United States:

Joseph D. Rich, Esquire
Robert A. Kengle, Esquire
Stephen B. Pershing, Esquire
Voting Section, Civil Rights Division
United States Department of Justice
P.O. Box 66128
Washington, D.C. 20035-6128
(202) 305-1238
(202) 307-3961 (Fax)

Counsel for Marsh Intervenors:

Paul M. Smith, Esq.
Donal B. Verrilli, Jr., Esq.
JENNER & BLOCK
601 13th Avenue N.W., Suite 1200
Washington, D.C. 20005
(202) 639-6000
(202) 630-6066 (Fax)

J. Gerald Hebert, Esq.
J. GERALD HEBERT, P.C.
5019 Waple Lane
Alexandria, VA 22304
(703) 567-5873
(703) 567-5873 (Fax)

Counsel for Virginia NAACP Intervenors:

Edward Still, Esq.
Voting Rights Project
Lawyers' Committee for Civil Rights Under Law,
1401 New York Avenue, N.W., Suite 400
Washington, D.C. 20005
(202) 662-8320
(202) 783-5130 (Fax)

Marc K. Temin, Esq.
Verne W. Vance, Jr., Esq.
Foley, Hoag & Eliot, LLP
One Post Office Square
Boston, MA 02190
(617) 832-1000
(617) 832-7000 (Fax)

Counsel for Smith Intervenors:

Neil Bradley, Esq.
Laughlin McDonald, Esq.
Cristina Correia, Esq.
Bryan Sells, Esq.
American Civil Liberties Union, Southern Regional Office
2725 Harris Tower
233 Peachtree Street, N.E.
Atlanta, GA 30303
(404) 523-2721
(404) 653-0331 (Fax)

Jacqueline A. Berrien, Esq.
NAACP Legal Defense and Educational Fund, Inc.
99 Hudson Street, Suite 1600
New York, NY 10013
(212) 965-220
(212) 226-7562 (Fax)

Todd A. Cox, Esq.
NAACP Legal Defense and Educational Fund, Inc.
1275 K Street, N.W., Suite 301
Washington, D.C. 20005
(202) 682-1300
(202) 682-1312 (Fax)

Victor M. Glasberg, Esq.
Kelly M. Baldrate, Esq.
Victor M. Glasberg & Associates
21 South Columbus Street
Alexandria, VA 22314
(703) 684-1100
(703) 684-1104 (Fax)

Rebecca Glenberg, Esq.
American Civil Liberties Union Foundation of Virginia
6 North 6th Street, Suite 400
Richmond, VA 23219
(804) 644-8080
(804) 649-2733 (Fax)

Counsel for City of Los Angeles Intervenors, et al.:

Brian S. Currey, Esq.
O'Melveny & Myers, LLP
400 Hope Street
Los Angeles, CA 90071
(213) 669-6685
(213) 430-6407 (Fax)

Karen M. Wahle, Esq.
O'Melveny & Myers, LLP
555 13th Street, N.W. Suite 500 West
Washington, D.C. 20004
(202) 383-5300
(202) 383-5414 (Fax)

/s/ Frank S. Ferguson

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

UNITED STATES OF AMERICA, *et al.*

Defendants.

CASE NUMBER: 1:00CV00751
JUDGE: HENRY H. KENNEDY
DECK TYPE: THREE JUDGE COURT (HHK, ESH, JWR)

AMENDED NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the plaintiff, Commonwealth of Virginia ("the Commonwealth"), by counsel, as authorized by 42 U.S.C. § 1973c and Rule 18.1 of the Rules of the Supreme Court of the United States, hereby appeals to the United States Supreme Court from the Order entered in the above-referenced action on October 17, 2000, by the United States District Court for the District of Columbia, sitting as a district court of three judges. The Commonwealth is appealing from the Order of the District Court dated October 17, 2000, to the extent that it dismisses Counts I, III and IV of the Commonwealth's Amended Complaint. These Counts of the Commonwealth's Amended Complaint seek a judgment declaring that 2000 Va. Acts ch. 884 either (1) does not need to be precleared pursuant to 42 U.S.C. § 1973c or, in the alternative, (2) is enforceable because it does not have a retrogressive purpose or effect. The District Court

dismissed these Counts based upon its conclusion that they are not yet ripe.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA,

By: /s/ A. Ann. Berkebile
Counsel

Mark L. Earley
Attorney General of Virginia

Randolph A. Beales
Chief Deputy Attorney General
Virginia State Bar No.: 27055

Frank S. Ferguson
Deputy Attorney General
Virginia State Bar No.: 17843

James W. Hopper
Senior Assistant Attorney General
District of Columbia Bar No.: 387719

Gregory E. Lucyk
Senior Assistant Attorney General
Virginia State Bar No.: 19754

A. Ann. Berkebile
Assistant Attorney General
Virginia State Bar No.: 31901

E. Scott Moore
Assistant Attorney General
Virginia State Bar No.: 36045

Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-2071

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Amended Notice of Appeal was served on the 31st day of October 2000, by first class mail, postage prepaid to:

Janet Reno,
Attorney General of the United States
Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4545
Washington, D.C. 20530-0001

Bill Lann Lee
Acting Assistant Attorney General
Civil Rights Section
Department of Justice
950 Pennsylvania Avenue, N.W.
Suite 5643
Washington, D.C. 20530-0001

Counsel for Defendant United States:

Joseph D. Rich, Esquire
Robert A. Kengle, Esquire
Stephen B. Pershing, Esquire
Voting Section, Civil Rights Division
United States Department of Justice
P.O. Box 66128
Washington, D.C. 20035-6128
(202) 305-1238
(202) 307-3961 (Fax)

Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Counsel for Marsh Intervenors:

Paul M. Smith, Esq.
Donal B. Verrilli, Jr., Esq.
JENNER & BLOCK
601 13th Avenue N.W., Suite 1200
Washington, D.C. 20005
(202) 639-6000
(202) 639-6066 (Fax)

J. Gerald Hebert, Esq.
J. GERALD HEBERT, P.C.
5019 Waple Lane
Alexandria, VA 22304
(703) 567-5873
(703) 567-5873 (Fax)

Counsel for Virginia NAACP Intervenors:

Edward Still, Esq.
Voting Rights Project
Lawyers' Committee for Civil Rights Under Law,
1401 New York Avenue, N.W., Suite 400
Washington, D.C. 20005
(202) 662-8320
(202) 783-5130 (Fax)

Marc K. Temin, Esq.
Verne W. Vance, Jr., Esq.
Foley, Hoag & Eliot, LLP
One Post Office Square
Boston, MA 02190
(617) 832-1000
(617) 832-7000 (Fax)

Counsel for Smith Intervenors:

Neil Bradley, Esq.
Laughlin McDonald, Esq.
Cristina Correia, Esq.
Bryan Sells, Esq.
American Civil Liberties Union, Southern Regional Office
2725 Harris Tower
233 Peachtree Street, N.E.
Atlanta, GA 30303
(404) 523-2721
(404) 653-0331 (Fax)

Jacqueline A. Berrien, Esq.
NAACP Legal Defense and Educational Fund, Inc.
99 Hudson Street, Suite 1600
New York, NY 10013
(212) 965-2200
(212) 226-7562 (Fax)

Todd A. Cox, Esq.
NAACP Legal Defense and Educational Fund, Inc.
1444 I Street, N.W., 10th Floor
Washington, D.C. 20005
(202) 682-1300
(202) 682-1312 (Fax)

Victor M. Glasberg, Esq.
Kelly M. Baldrate, Esq.
Victor M. Glasberg & Associates
121 South Columbus Street
Alexandria, VA 22314
(703) 684-1100
(703) 684-1104 (Fax)

Rebecca Glenberg, Esq.
American Civil Liberties Union Foundation of Virginia
6 North 6th Street, Suite 400
Richmond, VA 23219
(804) 644-8080
(804) 649-2733 (Fax)

Counsel for City of Los Angeles Intervenors, et al.:

Brian S. Currey, Esq.
O'Melveny & Myers, LLP
400 Hope Street
Los Angeles, CA 90071
(213) 669-6685
(213) 430-6407 (Fax)

Karen M. Wahle, Esq.
O'Melveny & Myers, LLP
555 13th Street, N.W.
Suite 500 West
Washington, D.C. 20004
(202) 383-5300
(202) 383-5414 (Fax)

/s/ A. Ann. Berkebile

Article I, Section 2 of the Constitution of the United States:

The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

The Fourteenth Amendment, Section 2:

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

The Census Act (13 U.S.C.):

§ 141. Population and other census information

(a) The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be

known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

(b) The tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States.

(c) The offices or public bodies having initial responsibility for the legislative apportionment or districting of each State may, not later than 3 years before the decennial census date, submit to the Secretary a plan identifying the geographic areas for which specific tabulations of population are desired. Each such plan shall be developed in accordance with criteria established by the Secretary, which he shall furnish to such officers or public bodies not later than April 1 of the fourth year preceding the decennial census date. Such criteria shall include requirements which assure that such plan shall be developed in a nonpartisan manner. Should the Secretary find that a plan submitted by such officers or public bodies does not meet the criteria established by him, he shall consult to the extent necessary with such officers or public bodies in order to achieve the alternations in such plan that he deems necessary to bring it into accord with such criteria. Any issues with respect to such plan remaining unresolved after such consultation shall be resolved by the Secretary, and in all cases he shall have final authority for

determining the geographic format of such plan. Tabulations of population for the areas identified in any plan approved by the Secretary shall be completed by him as expeditiously as possible after the decennial census date and reported to the Governor of the State involved and to the officers or public bodies having responsibility for legislative apportionment or districting of such State, except that such tabulations of population of each State requesting a tabulation plan, and basic tabulations of population of each other State, shall, in any event, be completed, reported, and transmitted to each respective State within one year after the decennial census date.

(d) Without regard to subsections (a), (b), and (c) of this section, the Secretary, in the year 1985 and every 10 years thereafter, shall conduct a mid-decade census of population in such form and content as he may determine, including the use of sampling procedures and special surveys, taking into account the extent to which information to be obtained from such census will serve in lieu of information collected annually or less frequently in surveys or other statistical studies. The census shall be taken as of the first day of April of each such year, which date shall be known as the "mid-decade census date".

(e)(1) If –

(A) in the administration of any program established by or under Federal law which provides benefits to State or local governments or to other recipients, eligibility for or the amount of such benefits would (without regard to this paragraph) be determined by taking into account data obtained in the most recent decennial census, and

(B) comparable data is obtained in a mid-decade census conducted after such decennial census,

then in the determination of such eligibility or amount of benefits the most recent data available from either the mid-decade or decennial census shall be used.

(2) Information obtained in any mid-decade census shall not be used for apportionment of Representatives in Congress among the several States, nor shall such information be used in prescribing congressional districts.

(f) With respect to each decennial and mid-decade census conducted under subsection (a) or (d) of this section, the Secretary shall submit to the committees of Congress having legislative jurisdiction over the census –

(1) not later than 3 years before the appropriate census date, a report containing the Secretary's determination of the subjects proposed to be included, and the types of information to be compiled, in such census;

(2) not later than 2 years before the appropriate census date, a report containing the Secretary's determination of the questions proposed to be included in such census; and

(3) after submission of a report under paragraph (1) or (2) of this subsection and before the appropriate census date, if the Secretary finds new circumstances exist which necessitate that the subjects, types of information, or questions contained in reports so submitted be modified, a report containing the Secretary's determination of the subjects, types of information, or questions as proposed to be modified.

(g) As used in this section, "census of population" means a census of population, housing, and matters relating to population and housing.

---

§ 195. Use of sampling

Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title [13 USCS §§ 1 et seq.].

---

42 U.S.C. § 1973c:

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) [42 USCS § 1973b(a)] based upon determinations made under the first sentence of section 4(b) [42 USCS § 1973b(b)] are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) [42 USCS § 1973b(a)] based upon determinations made under the second sentence of section 4(b) [42 USCS § 1973b(b)] are in effect shall enact

or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) [42 USCS § 1973b(a)] based upon determinations made under the third sentence of section 4(b) [42 USCS § 1973b(b)] are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f) [42 USCS § 1973b(f)(2)], and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively

indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code [28 USCS § 2284] and any appeal shall lie to the Supreme Court.

---

105 P.L. 209(j):

(j) Sufficient funds appropriated under this Act or under any other Act for purposes of the 2000 decennial census shall be used by the Bureau of the Census to plan, test, and become prepared to implement a 2000 decennial census, without using statistical methods, which shall result in the percentage of the total population actually enumerated being as close to 100 percent as possible. In both the 2000 decennial census, and any dress rehearsal or other simulation made in preparation for the 2000 decennial census, the number of persons enumerated

without using statistical methods must be publicly available for all levels of census geography which are being released by the Bureau of the Census for; (1) all data releases before January 1, 2001; (2) the data contained in the 2000 decennial census Public Law 94-171 data file released for use in redistricting; (3) the Summary Tabulation File One (STF-1) for the 2000 decennial census; and (4) the official populations of the States transmitted from the Secretary of Commerce through the President to the Clerk of the House used to reapportion the districts of the House among the States as a result of the 2000 decennial census. Simultaneously with any other release or reporting of any of the information described in the preceding sentence through other means, such information shall be made available to the public on the Internet. These files of the Bureau of the Census shall be available concurrently to the release of the original files to the same recipients, on identical media, and at a comparable price. They shall contain the number of persons enumerated without using statistical methods and any additions or subtractions thereto. These files shall be based on data gathered and generated by the Bureau of the Census in its official capacity.

---

15 C.F.R. part 101:

§ 101.1 Report of tabulations of population to states and localities pursuant to 13 U.S.C. 141(c).

(a)(1) The Director of the Census shall make the final determination regarding the methodology to be

used in calculating the tabulations of population reported to States and localities pursuant to 13 U.S.C. 141(c). The determination of the Director will be published in the Federal Register.

(2) All relevant authority of the Secretary of Commerce under 13 U.S.C. 141(c) and other applicable provisions of title 13 of the U.S. Code with respect to the decision to be made pursuant to paragraph (a)(1) of this section is hereby conferred upon the Director of the Census.

(3) The Director of the Census shall not make the determination specified in paragraph (a)(1) of this section until after he or she receives the recommendation of the Executive Steering Committee for A.C.E. Policy (ESCAP) in accordance with paragraph (b)(1) of this section.

(4) The determination of the Director of the Census shall not be subject to review, reconsideration, or reversal by the Secretary of Commerce.

(5) Nothing in this section diminishes the authority of the Secretary of Commerce to revoke or amend this delegation of authority or relieves the Secretary of Commerce of responsibility for any decision made by the Director of the Census pursuant to this delegation. This section shall remain in effect unless or until amended or revoked by the Secretary of Commerce.

(b)(1) The Executive Steering Committee for A.C.E. Policy shall prepare a written report to the Director of the Census recommending the methodology to be used in making the tabulations of population reported to States and localities pursuant to 13 U.S.C. 141(c).

(2) The report of the Executive Steering Committee for A.C.E. Policy described in paragraph (b)(1) of this section shall be released to the public at the same time it is delivered to the Director of the Census. This release to the public shall include, but is not limited to, posting of the report on the Bureau of the Census website and publication of the report in the Federal Register.

(3) The "Executive Steering Committee for A.C.E. Policy" (ESCAP) is composed of the following employees of the Bureau of the Census:

(i) Deputy Director and Chief Operating Officer;

(ii) Principal Associate Director and Chief Financial Officer;

(iii) Principal Associate Director for Programs;

(iv) Associate Director for Decennial Census (Chair);

(v) Assistant Director for Decennial Census;

(vi) Associate Director for Demographic Programs;

(vii) Associate Director for Methodology and Standards;

(viii) Chief; Planning, Research, and Evaluation Division;

(ix) Chief; Decennial Management Division;

(x) Chief; Decennial Statistical Studies Division;

(xi) Chief; Population Division; and (xii) Senior Mathematical Statistician.

§ 101.2 Availability of Other Population Information.

(a) When the Director of the Census determines pursuant to § 101.1(a)(1) of this part to use methodologies including the statistical method known as "sampling" to produce the tabulations of population to report to States and localities pursuant to 13 U.S.C. 141(c), data prepared without the use of such statistical method shall be made available to the public in accordance with the standards set forth in section 209(j) of Public Law 105-119, 111 Stat. 2440, simultaneously with the issuance of the report to States.

(b) When the Director of the Census determines pursuant to § 101.1(a)(1) of this part to produce tabulations of population without the use of methodologies including the statistical method known as sampling, for reporting to States and localities pursuant to 13 U.S.C. 141(c) notwithstanding a recommendation by the Executive Steering Committee for A.C.E. Policy to use sampling, data prepared with the use of such statistical method shall be made available to the public in accordance with the standards set forth in section 209(j) of Public Law 105-119, 111 Stat. 2440, for the release of data prepared without the use of such statistical method, simultaneously with the issuance of the report to States.

2000 Va. Acts ch. 884:

Be it enacted by the General Assembly of Virginia:

1. That §§ 24.2-304.1 and 24.2-309.1 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Article 2 of chapter 3 of Title 24.2 a section numbered 24.2-301.1 as follows:

§ 24.2-301.1. Reapportionment of congressional and state legislative districts; United States Census population counts.

For the purposes of redrawing the boundaries of the congressional, state Senate, and House of Delegates districts after the United States Census for the year 2000 and every ten years thereafter, the General assembly shall use the population data provided by the United States Bureau of the Census identical to those from the actual enumeration conducted by the bureau for the apportionment of the Representatives of the United States House of Representatives following the United States decennial census, except that the census data used for this apportionment purpose shall not include any population figure which is not allocated to specific census blocks within the Commonwealth, even though that population may have been included in the apportionment population figures of the Commonwealth for the purpose of allocating United States House of Representatives seats among the states.

§ 24.2-304.1. At-large and district elections; reapportionment of districts or wards; limits.

A. Except as otherwise specifically limited by general law or special act, the governing body of each county, city, or town may provide by ordinance for the election of its members on any of the following bases: (i) at large from the county, city, or town; (ii) from single-

member or multi-member districts or wards, or any combination thereof; or (iii) from any combination of at-large, single-member, and multi-member districts or wards. A change in the basis for electing the members of the governing body shall not constitute a change in the form of county government.

B. If the members are elected from districts or wards and other than entirely at large from the locality, the districts or wards shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as it practicable, representation in proportion to the population of the district or ward. In 1971 and every ten years thereafter, the governing body of each such locality shall reapportion the representation among the districts or wards, including, if the governing body deems it appropriate, increasing or diminishing the number of such districts or wards, in order to give, as nearly as is practicable, representation on the basis of population.

C. For the purposes of reapportioning representation in ~~1971~~ *2001* and every ten years thereafter, the governing body of a county, city, or town shall use ~~population figures of~~ the most recent decennial *population figures for such county, city, or town from the* United States ~~census for such county, city, or town~~. *Bureau of the Census, which figures are identical to those from the actual enumeration conducted by the United States Bureau of the Census for the apportionment of representatives in the United States House of Representatives, except that the census data for this apportionment purpose will not include any population figure which is not allocated to specific census blocks within the Commonwealth, even though that population may have been*

included in the apportionment population figures of the Commonwealth for the purpose of allocating United States House of Representatives seats among the states.

D. Notwithstanding any other provision of general law or special act, the governing body of a county, city, or town shall not reapportion the representation in the governing body at any time other than that required following the decennial census, except as (i) provided by law upon a change in the boundaries of the county, city, or town which results in an increase or decrease in the population of the county, city, or town of more than one percent, (ii) the result of a court order, (iii) the result of a change in the form of government, or (iv) the result of an increase or decrease in the number of districts or wards other than at-large districts or wards. The foregoing provisions notwithstanding, the governing body subsequent to the decennial redistricting may adjust district or ward boundaries in order that the boundaries might coincide with state legislative or congressional district boundaries; however, no adjustment shall affect more than five percent of the population of a ward or district or 250 persons, whichever is lesser. If districts created by a reapportionment enacted subsequent to a decennial reapportionment are invalid under the provisions of this subsection, the immediately pre-existing districts shall remain in force and effect until validly reapportioned in accordance with law.

§ 24.2-309.1. Election precincts; prohibiting precinct changes for specified period of time.

No county, city, or town shall create, divide, abolish, or consolidate any precincts, or otherwise change the

boundaries of any precinct, effective during the period from September 1, 1998, to ~~June 1~~ *May 15,* 2001, except as (i) provided by law upon a change in the boundaries of the county, city, or town, (ii) the result of a court order, (iii) the result of a change in the form of government, or (iv) the result of an increase or decrease in the number of local election districts other than at-large districts.

If a change in the boundaries of a precinct is required pursuant to clause (i), (ii), (iii), or (iv) above, the county, city, or town shall comply with the applicable requirements of law, including §§ 24.2-301 and 24.2-304.3, and send copies of the ordered or enacted changes to the State Board of Elections and the Division of Legislative Services.

This section shall not prohibit any county, city, or town from adopting an ordinance revising precinct boundaries or submitting that ordinance to the United States Department of Justice in accordance with Section 5 of the federal Voting Rights Act of 1965, as amended, before May 15, 2001. However, no revisions in precinct boundaries shall be implemented in the conduct of elections prior to May 15, 2001.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendant.

Case Number: 1:00cv00751
Judge: Henry H. Kennedy
Deck Type:
Three Judge Court

AFFIDAVIT OF ROBERT J. (JACK) AUSTIN

The undersigned, Robert J. (Jack) Austin, hereby declares under penalties of perjury, 28 U.S.C. § 1746, as follows:

1. I am an adult resident of the Commonwealth of Virginia, and I am competent to make this Affidavit. I am Special Projects Manager for the Division of Legislative Services. The Division of Legislative Services is the general research and drafting agency of the Virginia General Assembly. The Division's Special Projects Section which I head provides staff support to the General Assembly in meeting the responsibility given to it by the Constitution of Virginia to conduct state legislative and congressional redistricting following each decennial census. I was a Research Associate in the Division from 1979 until appointed Special Projects Manager in 1989. My duties included staffing the Senate and House Privileges and Elections Committees, the legislative committees whose jurisdiction includes redistricting. I also was Virginia's Liaison with the United States Bureau of the Census

("Bureau") for the Bureau's 1990 Census Redistricting Data Program and have been reappointed as Liaison for the year 2000 Program. I have served on the National Conference of State Legislature's Reapportionment Task Force since 1989.

2. The Commonwealth of Virginia relied upon and used the actual, enumerated population counts provided by the Bureau every ten years in drafting its decennial congressional redistricting plans, and its redistricting plans for decennial state House of Delegates and Virginia State Senate redistricting in 1971, 1981 and 1991. Upon information and belief, the Commonwealth also relied upon and used the enumerated population counts provided by the Bureau when drafting its plans for congressional redistricting and its plans for state legislative redistricting adopted prior to November 1, 1964.

3. 2000 Va. Acts ch. 884 ("Chapter 884") includes the following language: "except that the census data used for this apportionment purpose shall not include any population figure which is not allocated to specific census blocks within the Commonwealth . . . " I understand this language refers to military personnel and federal employees and their dependents who are overseas and who are considered citizens of Virginia for purposes of determining the number of representatives apportioned to Virginia's Congressional delegation, but who are not allocated to a particular locality and census block in the census, and therefore are not counted for redistricting purposes. Overseas military personnel and federal employees were first counted in this fashion in the 1970 census, and were treated in the same manner in the 1990 census. In 1980, the census did not include any overseas

population in the apportionment population. Chapter 884 thus is consistent with past practice and does not constitute a change from prior law.

4. Attached to this Affidavit as Exhibit A is a true and correct copy of a letter dated March 1, 2000, from Marshall L. Turner, Jr., Chief of Census 2000 Redistricting Data Office ("Turner"), to the Honorable S. Vance Wilkins, Jr., Speaker of the House for the Virginia General Assembly [hereinafter referred to as the "Turner Letter"]. A copy of this letter was sent to me by the Census 2000 Office in my capacity as Special Projects Manager of the Division of Legislative Services. This letter announces the Bureau's plan to release population counts following the completion of the 2000 census for the use of states in their redistricting process which will be adjusted through the use of statistical sampling and which will be classified as "PL94-171 Redistricting Data," and also states that the Bureau will also make the actual enumeration data which it has gathered in the 2000 census available upon request.

5. During the 1991 round of redistricting, the Commonwealth of Virginia received its redistricting data from the Bureau on January 22, 1991. The Bureau released Virginia's redistricting data for 1981 on February 25, 1981. I have been advised by Turner that the Bureau will not release Virginia's redistricting data for 2001 until sometime between March 1 and April 1, 2001.

D clared and signed under penalties of perjury, 28 U.S.C. § 1746, this 29th day of June 2000.

/s/ Robert J. Austin
Robert J. (Jack) Austin

(LOGO) **UNITED STATES DEPARTMENT OF COMMERCE**
Bureau of the Census
Washington, DC 20233-0001
OFFICE OF THE DIRECTOR

MAR 01 2000

The Honorable S. Vance Wilkins, Jr.
Speaker of the House
635 General Assembly Building
Richmond, VA 23218

Dear Speaker Wilkins:

This is in regard to the Census 2000 Redistricting Data Program.

Next year we will provide the governor and the majority and minority legislative leaders in each state with population data and associated geographic products from Census 2000. To satisfy the requirements of Public Law 94-171 (copy enclosed), we will furnish you a copy of the Census 2000 Public Law (P.L.) 94-171 Redistricting Data file on CD-ROM(s) by April 1, 2001. Barring unanticipated operational difficulties, these P.L. 94-171 Redistricting Data will reflect corrections for overcounts and undercounts as measured by the Accuracy and Coverage Evaluation.

In addition, we can also provide you with single copies of several other products if you wish. Please review the enclosed list and return to us an annotated copy on which you have indicated the specific items you wish to receive next year. This will assist us in planning timely and cost-effective production of the selected products.

When you send us your completed list, please include a covering letter that designates an individual on your staff with whom we can work on the technical issues of delivering these selected materials. In addition, please review the enclosed excerpt from *State Redistricting Profiles* (National Conference of State Legislatures, Denver, October 1999) and confirm your state's redistricting deadlines shown in item 6. While we cannot begin to deliver the population data earlier than March 2001, we will do all that is possible to consider your redistricting deadlines (if any) as we plan our processing.

The "Distribution List" below specifies the elected officials in your state to whom we are writing. If there are other elected officials who have a formal role in the redistricting process in your state, please let us know. We look forward to hearing from you, but in the meantime, if you have questions, please contact me or Ms. Cathy McCully of our Redistricting Data Office on 301.457.4039.

Thank you.

/s/

Marshall L. Turner, Jr., Chief
Census 2000 Redistricting Data Office

Enclosures

Distribution List

The Honorable James S. Gilmore, III,
Governor of Virginia
The Honorable John H. Hager, Presiding Officer
The Honorable John H. Chichester, President Pro Tem
The Honorable Walter A. Stosch, Senate Majority Leader
The Honorable Richard "Dick" L. Saslaw,
Senate Minority Leader

The Honorable S. Vance Wilkins, Jr., Speaker of the House
The Honorable Morgan Griffith, Majority Floor Leader
The Honorable C. Richard Cranwell, Minority Floor Leader

Information List

Dr. Robert J. Austin, Special Projects Director, Div. of Legislative Services

Mary Spain, Division of Legislative Services

February 13, 1975

THE HONORABLE WARREN E. BARRY
Member, Home of Delegates

You request my opinion whether the population base used for interim redistricting in Fairfax County "is legal" and enclosed a copy of the methodology employed by the county which was based on population adjusted by a housing-to-population conversion factor with consideration given to committed population growth.

Article VII, Section 5, of the Constitution of Virginia (1971) requires that a county redistrict " . . . in 1971 and every ten years thereafter, and also whenever the boundaries of such districts are changed. . . . " The governing body, however, has the power and "may, in a manner provided by law," conduct interim redistricting if it so desires. A number of alternatives could be utilized to constitute a redistricting base. For example, various states use, as opposed to total population, voting age population or citizen population only or in some instances registered voters. Virginia, however, has adopted the policy of using total population as its reapportionment base. Article VII, Section 5, mandates localities to implement this policy for the purpose of reapportionment of their governing bodies. *See* § 15.1-37.5 of the Code of Virginia (1950), as amended. Though localities are required to use the population of the most recent decennial census in reapportioning in 1971, and every ten years thereafter, there is no requirement that such figures be used for interim redistricting.

The method employed by Fairfax County is, as indicated, population based and therefore consistent with the

policy of Virginia of using total population figures. I find nothing in the methodology you submitted to indicate that the manner of arriving at such base is unlawful. I am, therefore, of the opinion that your inquiry must be answered in the affirmative.

From The Floor Debates Of
The Virginia House Of Delegates
Dated February 9, 2000:

* * *

[8] MR. SPEAKER: Thank you. Gentleman from Fairfax, Delegate Rust.

DELEGATE RUST: Mr. Speaker, speaking to the floor amendments. Let me make it clear [9] that the bill that's before you, which is undone by the floor amendments, is not a change in our system. It is an affirmation of the same system that we have used in redistricting since the census began. This bill is necessary –

UNIDENTIFIED: Mr. Speaker, –

MR. SPEAKER: Will the person, gentleman rise?

UNIDENTIFIED: Question.

MR. SPEAKER: Will the gentleman yield for a question?

DELEGATE RUST: Mr. Speaker, I'll be glad to yield for a question if the gentleman will let me finish my remarks.

MR. SPEAKER: Gentleman refused to yield.

DELEGATE RUST: Mr. Speaker, this bill is necessary to ensure our compliance with the decision of the Supreme Court that was rendered in January of 1999. In that case, the Court did require the use of enumeration for purposes of apportionment, and contrary to what the gentlelady from Alexandria said, it was for the purpose

of allocation of congressional seats and for the purposes of redistricting within [10] the state.

And let me explain to you what I mean. In that case there were basically two consolidated cases. One of which came forward from the House of Representatives and the other of which came from the Eastern District of Virginia. In the case in the Eastern District of Virginia, there were citizens from 13 states, including Virginia, a resident of Loudon [sic] County, who asserted that based upon sampling they would loose [sic] proportionate representation in the redistricting that was to be done. And Sandra Day O'Connor in her opinion said that they had standing because of the impact upon intrastate redistricting that sampling would have.

Therefore, Mr. Speaker, I say to you that the issue that was in the case was precisely the issue of redistricting on a local level.

Mr. Speaker, I would also say that decision itself was based upon the existing census statues. That is, they did not reach the constitutional issue. But the concurring opinion of Justice Scalea [sic] in which three other justices joined, indicated in dicta that there was a substantial issue whether any system [11] other than enumeration would stand constitutional muster.

Mr. Speaker, this legislation ensures that Virginia will use the only legally defensible system of enumeration for its census.

Now Mr. Speaker, I was first elected in 1979, and with Delegate Watts and many of the others that were here, I went through the redistricting in 1981 and we had

the very fortunate experience of running three years in a row because we didn't get the redistricting right. What this does is allows us with the judicial approval process that is in place in the Census Act, to take this bill forward and get a definitive decision on what is the proper manner, and I submit to you enumeration is the only proper manner, but we will have a definitive judicial decision before we begin redistricting which means that you and I will not have to run year after year after year because we will do it right the first time.

Mr. Speaker, I would urge that we pass the bill, I would urge that we defeat the floor amendments.

Finally, Mr. Speaker, let me say that it [12] is absolutely absurd to say that we are violating one man one vote. The decisions that came down, the progeny of the one man one vote system were all under an enumerated census. That was the basis upon which the decision was made. And the fundamental premise of one man one vote comes from the enumeration, and that's the census which has been approved.

* * *

[13] DELEGATE RUST: Mr. Speaker, I say to the gentleman that he is correct. The actual court decision that dealt with our first plan did not require single member districts. In fact, Governor Dalton required those in the reenactment of redistricting. But it was the multi-member districts that were the object of challenge.

But I would say to the gentleman that if we are to leave the enumeration system and the count undetermined before we begin redistricting, we will be faced

with two sets of numbers and an inability to decide which is the proper set of numbers to do our redistricting. This will allow us to determine the legally defensible system of numbering before we begin.

* * *

From The Floor Debates Of The
Virginia House Of Delegates
Dated February 10, 2000:

* * *

[6] DELEGATE RUST: Mr. Speaker, the gentleman from Smith [sic] has indicated that he could find no [7] reference to redistricting in Sandra Day O'Connor's opinion. Let me suggest to the gentleman that perhaps his pagination is different than mine, but if he would look on Page 9 in the Discuss [sic] of Standing, he'll find the words, and I'll read from the opinion. *"Appellees have also established standing on the basis of the expected affects* [sic] *of the use of sampling in the 2000 census on intrastate redistricting."*

It then refers to the affidavit that Dr. Webber filed which included the impact of sampling on Loudoun County Virginia, among other counties. And it said, *"Several of the appellees reside in these counties, and they will suffer vote dilution in state and local elections as a result of bureau's plan."*

When you go and look at the rest of the opinion, she concludes, *"Thus, the appellees who live in the aforementioned counties will have a strong claim that they have been injured by the bureau's plan because their votes will be diluted vis-a-vis residents of counties with larger undercount rates."*

Very clearly, Mr. Speaker, there is an [8] expressed reference to redistricting. It was the expressed basis upon which the Glavin opinion was consolidated with the House of Representatives' case, and it is the basis of the decision.

Let me say from a Virginia perspective, we want to count every man and woman. We want to count every child. We want to count everyone whether they are black or white or whatever their race or creed. This is part of the objective of redistricting, and part of the objective of the census. But we want to do it in a manner which is legally defensible. We want to do it in a manner which is the only manner which the Supreme Court has approved, and we want to do it in a fashion which will allow us to conclude a successful redistricting next year.

I urge you to pass the bill.

* * *

From The Floor Debates Of The
Senate Of Virginia On March 6, 2000:

* * *

[3] SENATOR FORBES: Thank you, Mr. President. Ladies and gentlemen of the senate, I rise in opposition to this amendment. Let me tell you why. First of all, it's either inartfully drafted or it would not be germane. And let me [4] explain why. If you look at the bill which we have before us which is 1486, the sole purpose of this bill deals with reapportionment for congressional state, senate and house of delegates districts. Has nothing to do with any other federal funding formulas that might come down to us for other things that might may [sic] be of concern.

Mr. President, I would suggest that if you look at this particular bill and if you try to determine what it says, if we're saying that we're going to use statistical sampling applied to federal funding formula for purposes of reapportionment, that would clearly be one against the federal statute. It would be against the constitution of the United States and it would fly in the face of the Supreme Court of the United States. So certainly we would not want it to be a part of this particular statute.

Secondly, to the extent that we are trying as a state to tell the federal government what they can and cannot do in their federal funding formulas, it would be absolutely meaningless because we would have no authority to do that.

* * *

[18] SENATOR FORBES: Mr. President, I would say to the distinguished senator that I do believe it's appropriate, and I'll be glad to respond why it is appropriate. First of all, if the senator also may not be aware that after the 1990 census was taken they looked at some of the statistical samplings that were done for census purposes, and one of the things that they came up with about a year after the census was that there was an undercount of approximately 2.1%. If they had used those figures to determine the allocation among the states, what they would have then found is about six months later they realized that there was a coding error for only 2,000 households, a very small set, that reduced that error from 2.1% to 1.6%. However, because they used statistical sampling, which is inherently incorrect, what they then found is that simple [19] 2,000 households that was [sic] coded wrong extrapolated into over a million voters that would have been allocated among the states incorrectly.

Mr. President, I would also say this, that using the actual enumeration is not something that I prefer, or any other member of this body prefers. Let me tell you why we need to do it. It's not a matter of preference, it is a fact that for 200 years we have used actual enumeration. That if you look in the Commonwealth of Virginia, go back, pick your time, 1970, 1980, 1990, we used it.

The other thing, Mr. President, I want to respond to a number of the questions that came up in talking about the appropriateness of using this particular method, the question came up why we didn't use this for funding purposes. Why we thought it was fair that we used it for vote allocations or reapportionment, and not use it for funding. And Mr. President, I would tell you that the

reason goes all the way back to our founding fathers. The Constitution of the United States very clearly says that we are to have an actual enumeration for purposes of [20] allocating votes for apportionment. And very clearly historically from a treatise point of view, from the cases of the United States Supreme Court, from the federal courts from 47 other states across the country, when they talk about apportionment, they're also talking about redistricting.

Mr. President, I would also say that if you look in 1956 for the first time – actually it was 1957. 1957 for the first time the Census Bureau changed and said that we could use sampling techniques for purposes of funding formulas because they were not prohibited by the Constitution of the United States.

Mr. President, the reason this bill is before us is very clear. The constitution mandates that we use actual enumeration.

Secondly, unlike what was stated on the floor a little bit earlier, for those of us who have read the case, the case very clearly states that the federal statute under 13 U.S.C. Section 1 and following mandates that we use actual enumeration and, Mr. President, I would say that the Supreme Court of the United States very clearly says that we need to use actual [21] enumeration. That's the reason that we're using actual enumeration, not because we like it or dislike it.

Mr. President, I would also like to say that one of the things we needs [sic] to do if there's an undercount is rather than go to a method that's inherently worse, is we need to try to go out and make sure every Virginian is

counted. That's why there's over a million dollars that's been put in the budget to make sure we do just that.

And finally, Mr. President, I want to respond as part – as whether or not this is an appropriate bill to this question about a public hearing. You know, every single bill that we have in this particular body when it comes before a committee is an opportunity for the public to come up and speak and address it. When this bill came up, nobody came up and addressed this bill that was against it at that particular point in time and asked all these questions.

* * *

[24] MR. PRESIDENT: Senator Forbes.

SENATOR FORBES: I assume that was a question, and if it was, Mr. President, I would say that I think whenever you use one number versus another number you're going to have the possibility of litigation, and that's certainly real no matter what we do.

One of the purposes of this bill and why it's so important that we do it, is we want to make sure that whatever numbers we use in the Commonwealth of Virginia are the right numbers. We want to make sure that they are the most legally defensible numbers, and I would suggest that complying with the constitution, the federal statute and the Supreme Court makes these the most legally defensible numbers.

* * *

United States
Census
2000

ACCURACY AND COVERAGE EVALUATION

STATEMENT ON THE FEASIBILITY OF USING STATISTICAL METHODS TO IMPROVE THE ACCURACY OF CENSUS 2000

Kenneth Prewitt, Director
U.S. Bureau of the Census
June 2000

Executive Summary

This document sets forth the rationale for the Census Bureau's preliminary determination that (1) it is feasible to produce statistically corrected census data within the time frame required by law and (2) the statistically corrected data will be more accurate.

Data from the decennial census are used to produce the state population totals for congressional apportionment. Additionally, detailed state data are used for redistricting, federal funds distribution, and other public and private sector purposes. Section 1419(b) of Title 13 requires the Secretary of Commerce to report state population totals from Census 2000 to the President by January 1, 2001. Section 141(c) requires the Census Bureau to report redistricting data directly to the states by April 1, 2001.

The census Bureau is committed to making its data as accurate as possible for all uses. In accordance with a 1999 Supreme Court ruling, the Census Bureau will not use statistical sampling to produce the state population

totals used for congressional apportionment. Because the Census Bureau expects it can produce more accurate data by supplementing traditional enumeration procedures with statistical sampling, it plans to use these statistical methods to produce the more detailed data required for redistricting and federal program purposes.

Prior to April 1, 2001, the Census Bureau will have completed an enumeration of the American population, including a coverage measurement survey, that is designed to improve the accuracy of the initial counts. The coverage measurement survey, called the Accuracy and Coverage Evaluation (A.C.E.), is based on the established statistical method known as Dual System Estimation (DSE) and is designed to correct for missed individuals or erroneous enumerations in the traditional enumeration. The method of Demographic Analysis will also be used to evaluate the completeness of population coverage in Census 2000 at the national level, and to assess changes from previous censuses.

The operations used to produce the apportionment counts are designed with the goal of counting and correctly locating every individual residing in the United States on April 1, 2000, and also to count federal employees and their dependents living overseas as of that date. This goal cannot be completely and accurately realized. Every decennial census, from 1790 to 1990, has included in the census counts some who should have been excluded, and has missed some who should have been included. The first source of error leads to an overcount: the second source to an undercount. Every census for which the effect of these errors has been systematically measured has shown a net undercount – that is,

the number of residents who were missed was greater than the number of erroneous enumerations.

* * *

Conclusions

The Census Bureau's mission is to produce the most accurate data possible, taking into account the intended uses of the data. The extensive body of research that the Census Bureau has conducted on census undercount, including the 1990 census evaluations, has conclusively demonstrated that traditional census methodologies will not effectively reduce the differential undercount. The Census Bureau has concluded that based on current state-of-the-art science, the best method or procedure that has the potential to reduce the differential undercount and thereby increase accuracy is the application of scientific sampling to improve traditional census methods. This view is widespread, though not unanimous, in the professional statistical community.

At the present time, the Census Bureau has also concluded that it is operationally feasible to complete the A.C.E. and produce statistically corrected census data prior to April 1, 2001, and expects that the corrected data will be the most accurate data available. The Census Bureau's final decision on what data to release as the most accurate data will not be made, however, until the Census Bureau has had an opportunity to review the conduct of the census and the A.C.E.

Preparing for the 2000 Census

Interim Report II

* * *

The Accuracy of Small-Area Data

The mathematics of sampling and estimation are such that, for a given sample design, the level of sampling error, relative to the size of the population to be counted, will increase as one moves to smaller and smaller geographic units. In general, other sources of census error tend to remain constant on average across units, relative to population, as one considers increasingly smaller geographic units.

Consider, for example, the errors that result from housing units being missed from the Master Address File. If they are missing at an average rate of 1 percent per block, then for a large geographic area that consists of perhaps 10,000 blocks (such as a congressional district), the rate of missing addresses will also be about 1 percent. But the coefficient of variation due to sampling error will only be one-hundredth the size for the congressional district that it is for the blocks in that district.

With any reasonable sampling strategy that the Census Bureau might adopt, the level of sampling error would be very small for a large geographic area, such as an urban county. In fact, as pointed out in the panel's first interim report and above, at such a geographic level there is a good case to be made that the introduction of sampling procedures can lead to an overall net reduction in

errors because the errors that can be reduced when sampling is used outweigh the sampling error introduced. Inevitably, however, this does not hold true at very small levels of geography. With any reasonable sampling scheme that might be used nationally, there will be some levels of aggregation (for example, census blocks) for which the census count will be less precise on average and would arguably not be an improvement over what could be obtained without the use of sampling.

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMONWEALTH OF VIRGINIA, Plaintiff,	:	Civil Action No. 00-0751
v.	:	
JANET RENO, ET AL., Defendants.	:	

Washington, D.C.
September 21, 2000
9:30 a.m.

Motions Hearing

Before the Honorable Henry H. Kennedy, Jr., the Honorable Ellen Segal Huvelle, and the Honorable Judith W. Rogers
United States District Judges

APPEARANCES:

For the Plaintiff: FRANK S. FERGUSON, ESQ.
GREGORY E. LUCYK, ESQ.
A. ANN BERKEBILE, ESQ.

For the Defendants: STEPHEN B. PERSHING, ESQ.
JACQUELINE A. BERRIEN, ESQ.
NEIL BRADLEY, ESQ.
TODD A. COX, ESQ.
BRIAN F. HEFFERNAN, ESQ.
JENNIFER MODELL, ESQ.
PAUL M. SMITH, ESQ.
EDWARD STILL, ESQ.

Court Reporter: MONICA G. MAZZEO
Miller Reporting Company, Inc.
735 8th Street, S.E.
Washington, D.C. 20003
(202) 546-6666

* * *

[6] more accurate.

When the Census Bureau comes up with its decision, and not until then, will the bureau be able to announce to the world which set of data, adjusted or unadjusted, are in its judgment and as a scientific matter most accurate overall.

JUDGE HUVELLE: Perhaps you could explain how is the adjusted census data intended to be used when determining purpose and effect.

MR. PERSHING: That is broad question, Your Honor. The Justice Department's narrow purview and indeed the purview of this court when the ultimate issue comes before it is to determine the effect of the use of in this case a change in choice of census data on redistricting. This case is not about the data per se. It is about the difference they make in redistricting. That can only be determined or projected once the numbers are available to look at. We will have to look at both sets of numbers to try to figure out how they each affect districting prospects for minority voters. Do they have an effect? And if so, what effect on the situation of minority voters in districting relative to the existing situation of those voters.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMONWEALTH OF VIRGINIA,	**CASE NUMBER: 1:00CV00751**
Plaintiff,	**JUDGE: HENRY H. KENNEDY**
v.	
UNITED STATES OF AMERICA, *et al.*	**DECK TYPE: THREE JUDGE COURT**
Defendants.	

MEMORANDUM OPPOSING DEFENDANTS' MOTION TO DISMISS OR STAY AND IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The plaintiff Commonwealth of Virginia ("Commonwealth") submits this Memorandum Opposing Defendants' Motion to Dismiss or Stay and in Support of its Motion for Summary Judgment.[1] Summary judgment is warranted because there is no dispute in any material fact and plaintiff is entitled to judgment as a matter of law. The expedited procedures offered by summary judgment are especially necessary here in order to avoid delays in the conduct of Virginia's 2001 elections and thus to protect the right of the citizens of Virginia to vote in timely held elections.

It must be emphasized that Virginia is one of only a few states holding odd year elections for state executive

---

[1] The Commonwealth's Motion for Summary Judgment is also being filed in response to the claims of the applicants for intervention in this proceeding.

and legislative offices. Before elections can be held in Virginia next year, new election districts must be drawn and preclearance under Section 5 of the Voting Rights Act of 1965, as amended (hereinafter referred to as "Section 5") obtained in the compressed schedule necessary to accommodate candidate filings, nomination by primary or convention, and a vigorous election campaign, all before the conduct of general elections in November. The issues raised in this action must, of necessity, be decided promptly and finally in order to allow timely elections to proceed.

At the outset, this Court must reject defendants' Motion to Dismiss or Stay because each of the issues raised in Plaintiff's Amended Complaint are ripe for review, and withholding judicial review would impose irreparable hardship on the people of the Commonwealth of Virginia. As the record confirms, the lengthy delay sought by defendants would prevent the scheduling of timely elections for next year. *See* Affidavit of Cameron Quinn dated June 27, 2001 ("Quinn I Affidavit"), attached as Exhibit 1.

Defendants argue that the issues raised in the Amended Complaint are not ripe for review because the United States Bureau of the Census ("the Bureau") does not yet know whether the official census data to be released next April for the use in redistricting will be statistically adjusted. This assertion is patently disingenuous, as will be shown below. Indeed, this Court already has chided the Bureau for taking this position in an earlier case: " '[C]ontingent future events that may not occur as anticipated, or indeed may not occur at all' are necessary for statistical sampling *not* to be used in the

2000 census . . . " *House of Representatives v. Department of Commerce*, 11 F.Supp.2d 76, 92 (D.C. 1998) (Three Judge Court) (emphasis by Court). Regardless, whether the final release is adjusted or not is immaterial to the question raised by Count I of the Amended Complaint, i.e., whether Chapter 884 of the 2000 Acts of the Virginia General Assembly ("Chapter 884") even amounts to a "change" in Virginia law which requires preclearance under Section 5. Count I presents a pure question of law which requires no further factual development beyond the record now before this Court,[2] and it is well settled that purely legal questions are presumptively fit for judicial review. *Chamber of Commerce v. Reich*, 57 F.3d 1099, 1100 (D.C. Cir. 1995). In sum, as a matter of law, Virginia has changed nothing, and it is entitled to a prompt judgment confirming that conclusion.

The grant of relief requested by Counts III and IV likewise is not dependent upon the type of data released by the Bureau. Those counts ask the Court to find that the actual enumeration data requirements of Chapter 884 are not retrogressive in purpose or effect – issues which the Court need not even reach if it finds in Count I that Chapter 884 is not covered by Section 5. Our state statute is not retrogressive as a matter of law, because it does not

---

[2] The only two findings relevant to this inquiry, and they are undisputed, are (i) that Virginia historically has conducted decennial redistricting at the congressional, state and local levels using population counts provided by the United States Bureau of the Census which have not been adjusted through the use of statistical sampling, and (ii) Chapter 884 now mandates the continued use of population data which has not been adjusted by statistical sampling for future redistrictings.

occasion "backsliding." *See Reno v. Bossier Parrish* [sic] *School Board, et al.*, ___ U.S. ___, 120 S.Ct. 866, 875 (2000) [hereinafter "*Bossier Parrish* [sic]"] ("As we have repeatedly noted, in vote dilution cases, Section 5 prevents nothing but backsliding, and preclearance under Section 5 affirms nothing but the absence of backsliding."). It is undisputed that the *benchmark* here for the Commonwealth's redistricting data choice is the actual enumeration provided by the Bureau in decades past. Thus, the continued use of Redistricting data, not adjusted by statistical sampling, cannot amount to backsliding. In sum, Section 5 is satisfied, the preclearance must be granted.

Defendants' other contentions attacking the ripeness of the remaining Counts of the Amended Complaint will be rebutted later in this Memorandum.

STATEMENT OF MATERIAL FACTS TO WHICH THERE IS NO GENUINE ISSUE

Virginia is one of only a few states holding odd year elections for state executive and legislative offices. Before elections can be held in Virginia next year, new election districts must be drawn and preclearance under Section 5 obtained in the compressed schedule necessary to accommodate candidate filings, nomination by primary or convention, and a vigorous election campaign, all before the conduct of general elections in November. *See* Quinn I, §§ 3-4, Exhibit 1, *see also* 2000 Va. Acts of Assembly, Ch. 908.

Article 1, § 2, cl. 3 of the United States Constitution authorizes Congress to direct "an actual enumeration" of the American public every ten years to provide a basis for

apportioning congressional representation among the States. As recognized by the Supreme Court of the United States in *Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 119 S.Ct. 765, 773-75 (1999) (hereinafter referred to as "*DOC v. House*"), the population counts generated by these decennial "actual enumerations" have also been used, traditionally, by the states in their intrastate redistricting process.[3] Pursuant to Article 1, § 2, cl. 3, Congress has enacted the Census Act, 13 U.S.C. § 1 *et seq.*, delegating the authority to conduct the decennial census to the Secretary of Commerce. 13 U.S.C. §§ 5, 141.

The Supreme Court of the United States also recognized in *DOC v. House*, 525 U.S. 316, 119 S. Ct. at 769, that prior to the 2000 census, the decennial population counts conducted pursuant to Article 1, § 2, cl. 3 of the United

---

[3] When the term "actual enumeration" is used throughout this Memorandum, it is meant to refer to *actual*, non-estimated population counts which have not been estimated or adjusted through the use of statistical sampling, such as the redistricting data which historically has been provided to Virginia. While the "actual enumerations" which have been used in the past to determine the number of Representatives to which each state is entitled in the House of Representatives have at times included United States citizens living abroad, the "actual enumerations" which have been previously provided by the Bureau to the states for use in redistricting (including block geographical and racial data), and used by Virginia in its redistricting process, have not included the overseas population. (Affidavit of Robert J. (Jack) Austin, attached as Exhibit 2) [hereinafter referred to as "Austin Affidavit"]. The population counts provided by the Bureau for the use of states in the process of redistricting will be referred to in this Memorandum as either "Redistricting data" or "PL94-171 Redistricting data."

States Constitution and the Redistricting data provided to the states every ten years by the Bureau, part of the Department of Commerce, have constituted actual counts of the persons counted in each decennial census. They were not adjusted through the use of statistical sampling. The Commonwealth has relied upon and used the Bureau's Redistricting data, not previously adjusted through the use of sampling, when drafting its plans for congressional redistricting and its plans for decennial state legislative redistricting in 1971, 1981 and 1991.[4] The Commonwealth also has relied upon the Redistricting data provided by the Bureau when drafting its plans for congressional redistricting and its plans for state legislative redistricting prior to November 1, 1964. *See* Austin Affidavit. Similarly, Virginia's General Assembly required localities to use the Redistricting data provided by the Bureau in prior decennial redistrictings. *See* 1975 Op. Va. Att'y Gen. 331 (Exhibit 3); Va. Code § 24.2-304.1 (1995) (Exhibit 4).

The Bureau has now announced a dramatic change in its approach. "Barring unanticipated operational difficulties," the Bureau plans to release population counts following the completion of the 2000 census for the use of states in their redistricting process which will be adjusted through the use of statistical sampling and which will be classified as the official "PL94-171 Redistricting data."[5]

---

[4] Again, the actual counts previously provided by the Bureau for use in redistricting have not included the overseas population.

[5] "PL94-171 Redistricting data" is a short-hand reference to the official Redistricting data released by the Bureau for the use of states in their redistricting process.

See Letter dated March 1, 2000, from Marshall L. Turner, Jr., Chief of Census 2000 Redistricting Data Office, to the Honorable S. Vance Wilkins, Jr., Speaker of the House for the Virginia General Assembly (attached as Exhibit A to Austin Affidavit) [hereinafter referred to as the "Turner Letter"]; *see also DOC v. House*, 525 U.S. 316, 119 S. Ct. at 770-71; UNITED STATES DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, REPORT TO CONGRESS – THE PLAN FOR CENSUS 2000 (Originally Issued July 1997; Revised and Reissued August 1997) (Exhibit 5); UPDATED SUMMARY: CENSUS 2000 OPERATIONAL PLAN (February 1999, U.S. Department of Commerce) (Exhibit 6). Despite Defendants' contentions to the contrary, it is a virtual certainty that the Bureau's official, 2001 PL94-171 Redistricting data will be adjusted through the use of statistical sampling. At the very least, it is clear from the Turner Letter that the discretionary decisions regarding whether to engage in statistical sampling *have been made*, and the only remaining questions are operational.[6] The Bureau will also make unadjusted Redistricting data available, but only upon request. *See*

---

[6] The precise manner of the statistical sampling/adjustment of the PL94-171 Redistricting data, however, appears not to have been finalized. As a result of the Supreme Court's 1999 decision in *DOC v. House* requiring the Bureau to complete an actual enumeration in the 2000 census, the Bureau has been forced to modify its plan for statistical sampling in the creation of PL94-171 Redistricting data. *See, e.g.*, Census Decision Memorandum No. 97 (dated February 8, 2000) (discussing modification of the Bureau's plan to supposedly address criticisms of the statistical adjustment based on the planned *deletion of certain persons who are actually counted in the census*) (Exhibit 7).

Turner Letter (Exhibit A to Austin Affidavit). Both types of data are expected to be available to the Commonwealth before April 1, 2001. *Id.* The process of adjustment actually impedes the Commonwealth's ability to promptly redistrict, because the April 1, 2001 date is significantly later than the date Virginia has received its redistricting data in the past. Following the last decennial census, Virginia was provided its redistricting data (based upon an unadjusted, actual enumeration) on January 22, 1991. (*See* Affidavit of Robert J. (Jack) Austin, ¶ 5, Exhibit 2).

The Voting Section of the United States Department of Justice ("DOJ") has indicated that it views state legislation requiring the use of enumerated population counts, not adjusted through the use of statistical sampling, to be subject to the preclearance requirements of Section 5. *See* Affidavit of Lisa Daniels Flores, Counsel to the Honorable Jane Dee Hull, Governor of Arizona, and attachments thereto. (Exhibit 8) [hereinafter referred to as "Flores Affidavit"]. *See also* Defendants' Memorandum in Support of Motion to Dismiss or Motion to Stay ("Defendants' Memorandum") at pp. 32-35. DOJ has also announced its intention to rely upon the population counts referred to as PL94-171 Redistricting data, which the Bureau inexorably intends to adjust through the use of statistical sampling, when evaluating redistricting submissions made by the States under Section 5. *See* Attachments to Flores Affidavit. Defendant Janet Reno, as Attorney General of the United States, is the head of DOJ. Defendant Bill Lann Lee is the Acting Attorney General in charge of the Civil Rights Section of DOJ which, in

turn, oversees the Voting Section of DOJ. *See* Organization Chart of DOJ (*www.usdoj.gov/dojorg.htm*); Civil Rights Division Home Page (*www.usdoj.gov/crt/crt-home.html*); Overview of Activities and Programs of DOJ (*www.usdoj.gov/crt/activity.html*). *See also* 28 C.F.R. § 51.3 (reflecting that the Attorney General has delegated the authority for determinations under Section 5 to the Assistant Attorney General, Civil Rights Division).

In the 2000 session of the Virginia General Assembly, the Commonwealth enacted a new code provision (Va. Code § 24.2-301.1) mandating the continued use of enumerated and unadjusted Redistricting data provided by the Bureau following the 2000 census, and each subsequent decennial census, for the purpose of redrawing the boundaries of congressional, state Senate and House of Delegates districts in Virginia. *See* 2000 Va. Acts ch. 884 (referred to as "Chapter 884" in the Commonwealth's Amended Complaint and attached thereto). The General Assembly also amended Va. Code § 24.2-304.1 in Chapter 884 to require Virginia's localities to continue using the Redistricting data unadjusted through the use of statistical sampling in their local redistricting processes. *Id.* This legislation was enacted for several purposes: to ensure the Commonwealth's compliance with the Constitution of the United States with respect to the type of data used when redistricting; to ensure the Commonwealth's compliance with Section 195 of the Census Act, as interpreted by the Supreme Court of the United States in *DOC v. House*; to implement a legally defendable method of redistricting in light of the Supreme Court's opinion in *DOC v. House*, and to avoid or lessen the possibility of confusion, inaccuracies, errors, and legal action which

would be likely to result from either (1) a change in the type of data used in Virginia's decennial redistricting from actual enumeration to statistical sampling, or (2) the failure of the Commonwealth of Virginia to clarify by statute the type of data to be used in Virginia's decennial redistrictings. *See* Excerpts from the Floor Debates in the Virginia House of Delegates and Affidavit of Bruce F. Jamerson, Clerk of the Virginia House of Delegates (Exhibit 9) and Excerpts from the Floor Debates of the State Senate and Affidavit of Susan Clarke Schaar, Clerk of the Virginia Senate (Exhibit 10). This is especially important because the Bureau has announced unequivocally that regardless of what it declares to be "official," it will release *both* the enumerated and the statistically adjusted data next April. (*See* Proposed Regulation issued June 13, 2000, § 101.2(a)(b), appended as Attachment 2 to Defendants' Motion to Dismiss or Stay). Chapter 884 thus promotes consistency and uniformity in Virginia's districting processes by prescribing which of the two available data types must be used by districters at the state and local level.

Chapter 884 was not enacted for the purpose of weakening the position of minority voters in Virginia. In fact, as will be explained in more detail below, the General Assembly's decision not to change the type of data used in Virginia during the redistricting process actually evinces an intent to maintain the status quo and, therefore, the measure simply cannot be characterized in any way as "retrogressive" in nature. Furthermore, in an effort to ensure that all Virginians, including all minority individuals, are aware of the census count and to make certain that they are counted in the actual enumeration,

the Virginia General Assembly also passed an amendment to the budget for the current fiscal year, which took immediate effect, allocating a half million dollars in new money to be spent on census advertising. (2000 Va. Acts ch. 1072, Item 547(Y)) (Exhibit 11).

Chapter 884 also includes a provision relating to localities. It amended Va. Code § 24.2-309.1 by reducing the time during which Virginia's counties, cities and towns will not be permitted to create, divide, abolish or coordinate their precincts or to change the boundaries of any precinct. The prior version of Va. Code § 24.2-309.1, a copy of which is attached as Exhibit 12, prohibited localities from redrawing the boundaries of their precincts from September 1, 1998, until June 1, 2001, and the amended provision permits localities to redraw their precincts beginning on May 15, 2001. *See* Affidavit of Cameron Quinn dated June 11, 2000 ("Quinn II Affidavit"), attached as Exhibit 13. DOJ has announced that it does not oppose the Commonwealth's request that this portion of Chapter 884 be precleared. (Defendants' Memorandum at p. 2, n. 3).

Defendants' Motion to Dismiss and Motion to Stay should be denied for the reasons explained below.[7] In addition, the Commonwealth is entitled to declaratory

---

[7] While it may be appropriate in certain limited circumstances for a single judge to consider a Motion to Dismiss, it is not appropriate in the case at bar because the Commonwealth has now requested summary judgment relating to the merits of its claims. Furthermore, a three judge panel of this Court does have the authority to consider all of the Commonwealth's claims. *See infra* note 8.

rulings in this proceeding in the following respects. First, the Commonwealth is clearly entitled to a judgment declaring that its *continued* use of enumerated and unadjusted Redistricting data in intrastate redistricting does not constitute a change requiring Section 5 preclearance. Alternatively, the Court should declare that Virginia's use of unadjusted Redistricting data, not modified through the use of statistical sampling, in its process of intrastate redistricting need not be precleared because the use of such data is *required* by the Constitution of the United States and the Census Act. Should, however, the Court conclude that the Commonwealth's statutes providing for the use of unadjusted Redistricting data in intrastate redistricting are subject to the preclearance requirements of Section 5, the Commonwealth is entitled to a judgment declaring the statutes do not have a *retrogressive* purpose or effect because they are entirely race neutral and *they actually maintain the status quo.*

To ensure that DOJ uses appropriate and lawful population data when reviewing the Commonwealth's redistricting plans under Section 5 and to avoid unnecessary delays in the Section 5 approval process, this Court should also award a judgment declaring that DOJ's plan to use the Bureau's adjusted PL94-171 Redistricting data when reviewing Section 5 redistricting submissions is unconstitutional and in violation of the Census Act.

Lastly, because DOJ does not oppose the Commonwealth's request for preclearance of the amendment to Va. Code § 24.2-309.1, the Commonwealth is entitled to a judgment declaring the portion of Chapter 884 giving localities a greater amount of time to redraw their precincts does not have a retrogressive purpose or effect and

declaring that the Commonwealth may enforce this provision without impediment.

ARGUMENT

I. A Prompt Declaratory Ruling Is Necessary And Appropriate To Prevent Interference With Virginia's Redistricting Process And Elections.

A. The Issues Presented by this Case are Ripe for Judicial Review.

Ripeness of the Count I coverage issue (i.e., whether the statutes requiring that Redistricting data be used in Virginia's redistricting process which has not been adjusted through the use of sampling constitutes a change requiring preclearance) is discussed at pp. 2-3, *supra,* of this Memorandum. In addition, this Court clearly has the authority to determine and decide the issues raised in Counts III and IV, i.e., whether the statutory provisions at issue in this case are retrogressive in purpose or effect, pursuant to 42 U.S.C. § 1973c. As will be explained in more detail below, the issue of whether Virginia's enactment of legislation requiring the continued use of Redistricting data unadjusted by sampling in the redistricting process has a retrogressive purpose and effect is ripe for resolution by this Court because (1) it is virtually certain that the official PL94-171 Redistricting data released by the Bureau will be adjusted *via* statistical sampling, (2) prompt preclearance of Va. Code §§ 24.2-301.1 and 24.2-304.1 is necessary to prevent harm to the Commonwealth's citizens by way of interference with Virginia's 2001 elections, and (3) it is clear that the legislation at issue in this proceeding maintains the status

quo, and, therefore, cannot have a retrogressive purpose or effect.

Furthermore, contrary to Defendants' ripeness arguments, an actual controversy exists between the parties with respect to the use of unadjusted versus adjusted Redistricting data in the redistricting process following the completion of the 2000 census (i.e., the issues raised by Counts I and II of the Amended Complaint). The statutory provisions mandating the use of enumerated population counts in the redistricting process do not require Section 5 preclearance because (1) they do not constitute a "change" in its voting practices and (2) because the use of unadjusted population counts is legally required by the United States Constitution and the Census Act. The Commonwealth also asserts that DOJ's plan to rely upon adjusted Redistricting data provided by the Bureau when reviewing state redistricting submissions pursuant to Section 5 is unconstitutional. In contrast, the United States, through its agency DOJ, takes the position that the enactment of state legislation requiring the use of enumerated data in the redistricting process must be precleared under Section 5. *See* Flores Affidavit (Exhibit 8). *See also* Defendants' Memorandum at pp. 32-35.

Perhaps even more importantly, it is also undisputed that DOJ intends to disregard state legislation requiring the use of enumerated and unadjusted Redistricting data when drafting redistricting plans and, instead, intends to review state redistricting plans for Section 5 preclearance based upon the use of the Redistricting data adjusted through the use of statistical sampling (i.e., what the

Bureau intends to release as the official PL94-171 Redistricting data). Attached to the Flores Affidavit is a letter from DOJ stating the following:

> it is the consistent practice of [DOJ] in evaluating submissions under Section 5 of the Voting Rights Act to analyze redistricting plans using the data designated by the Bureau of the Census for redistricting pursuant to PL 94-171. . . . *Thus, the Attorney General's review and assessment of any redistricting plan under Section 5 will not be restricted by [a state's] redistricting process.* . . .

(emphasis added). Letter dated March 24, 2000, from Joseph D. Rich, Acting Chief of DOJ's Voting Section to Governor and Attorney General of Arizona (attached to Flores Affidavit as Exhibit C). Because the PL94-171 Redistricting data referred to in DOJ's letter to Arizona will almost certainly be adjusted through the use of statistical sampling, and, therefore, will be used when reviewing the Commonwealth's redistricting plans (which will have been formulated using unadjusted Redistricting data), it is clear that a "case and controversy" exists between the parties to this case with respect to Count II of the Amended Complaint.

Defendants contend, however, that the issues presented by this are not ripe for review because the Bureau has indicated "that a final decision of the use of sampling will not be reached until a thorough analysis of the data is completed." (Defendants' Memorandum at p. 8). This contention is wholly inconsistent with the numerous public pronouncements issued by the Bureau regarding its plans. The Bureau's consistent message has been that release of the adjusted data is *inevitable*. For instance, on

March 1, 2000, Marshall Turner, the Chief of the Census 2000 Data Office, wrote to the Honorable Vance S. Wilkins, Jr., Speaker of the Virginia House of Delegates, and stated the following:

> Next year we will provide the governor and the majority and minority legislative leaders in each state with population data and associated geographic products from Census 2000. To satisfy the requirements of Public Law 94-171 (copy enclosed), we will furnish you a copy of the Census 2000 Public Law (P.L.) 94-171 Redistricting Data file on CD-ROM(s) by April 1, 2001. *Barring unanticipated operational difficulties, these P.L. 94-171 Redistricting Data will reflect corrections for overcounts and undercounts as measured by the Accuracy and Coverage Evaluation.*

(*See* Turner Letter, attached to Austin Affidavit as Exhibit A) (emphasis added).

Very recently, on June 14, 2000, the Bureau published its *Accuracy and Coverage Evaluation*, which is attached as Attachment 1 to the Defendants' Memorandum in Support of Motion to Dismiss. In the Executive Summary on page one, the evaluation states:

> The Census Bureau is committed to making its data as accurate as possible for all uses. In accordance with a 1999 Supreme Court ruling, the Census Bureau will not use statistical sampling to produce the state population totals used for congressional apportionment. *Because the Census Bureau expects it can produce more accurate data by supplementing traditional enumeration procedures with statistical sampling, it plans to use these statistical methods to produce the more detailed*

> ***data required for redistricting and federal program purposes.***

(Emphasis added). The inevitability of the Bureau's release of adjusted data is restated in the report's conclusion:

> *At the present time, the Census Bureau has also concluded that it is operationally feasible* to complete the A.C.E. and produce statistically corrected census data prior to April 1, 2001, and expects that the corrected data will be the most accurate data available.

In summary, "at the present time" the Bureau has "concluded that it is operationally feasible" to release adjusted data; the Bureau "plans" to release adjusted data; and the adjusted data will be released unless there are *"unanticipated operational difficulties."*

Ripeness is not an absolute measure. In *Texas v. United States*, 523 U.S. 296 (1998), which involved a statute that had *already been examined* by DOJ, the Supreme Court declined to review statutory provisions applying sanctions to school districts which did not meet state accreditation criteria. The Court stated: "Texas has not pointed to any school district in which the application of [statutory sanctions] *is currently foreseen or even likely.*" (Emphasis added). Thus, if an event is *foreseeable*, or is *likely to occur*, ripeness is satisfied. *See also, Maryland Right to Life v. Weathersbee*, 975 F. Supp. 791, 793 (D. Md. 1997) ("Ripeness is concerned with . . . whether an injury that has not taken place is likely to occur"). Here, there is no question that as a matter of settled policy, the Bureau intends to release adjusted census data as the official

PL94-171 Redistricting data, and will do so absent "unanticipated" difficulties. There is also no question that the Commonwealth will be harmed by a delay in Virginia's elections if the controversies presented by the Amended Complaint are not resolved promptly by this Court.

B. The Declaratory Judgment Standard.

As previously recognized by this Court,

> The statute providing for declaratory judgments meets a real need and should be liberally construed to accomplish the purpose intended, i.e. to afford a speedy and inexpensive method of adjudicating legal disputes . . . and to settle legal rights and remove uncertainty and insecurity from legal relationships without awaiting a violation of the rights or a disturbance of the relationships. (citations and quotations omitted).

Commonwealth of Puerto Rico v. Alexander, 438 F. Supp. 90, 93 n. 5 (D.D.C. 1977). *See also Paradyne Corp. v. United States Department of Justice*, 647 F. Supp. 1228 (D.D.C. 1986) (recognizing that declaratory judgments are issued as a matter of judicial discretion exercised in the public interest). This Court has also recognized that the

> [t]wo criteria ordinarily relied upon to determine whether a court should, in its discretion, grant a declaratory judgment are (1) whether the judgment will 'serve a useful purpose in clarifying the legal relations in issue,' or (2) whether the judgment will 'terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.'

Coordination Council for North American Affairs v. Northwest Airlines, Inc., 891 F. Supp. 4, 7 (D.D.C. 1995) (quoting *President v. Vance*, 200 U.S. App. D.C. 300, 627 F.2d 353, 364 n. 76 (D.C. Cir. 1980)).

Both of these criteria are met in this case. The declaratory judgment sought by the Commonwealth will "serve a useful purpose" by clarifying whether Virginia's mandated use of enumerated and unadjusted population counts in the Commonwealth's redistricting process is required by the Constitution of the United States and by deciding whether the Commonwealth's continued use of such data is subject to the preclearance requirements of Section 5. A judgment declaring that the DOJ's refusal to use unadjusted and enumerated Redistricting data when reviewing future state redistricting submissions is unconstitutional will also serve the "useful" purpose of declaring the proper type of data to be used in the redistricting process and in future Section 5 reviews. The judgment requested by the Commonwealth will also "afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding" by allowing the Commonwealth to draft its redistricting plans using the unadjusted Redistricting data released in 2001 without concern that Section 5 preclearance will be denied by DOJ because of the Commonwealth's refusal to use the adjusted figures. In addition, a prompt judgment by this Court will avert disruption in the Commonwealth's elections arising out of further disputes with DOJ regarding the type of data used when formulating Virginia's redistricting plans.

Finally, declaratory relief is also appropriate in this case because the "threat of injury" to the Commonwealth in the absence of such relief is both "real and immediate"

and not "conjectural or hypothetical." *O'Shea v. Littleton*, 414 U.S. 488, 494 (1973). Here, the Attorney General of the United States, through the Voting Section of DOJ, has "pointedly informed" state officials that DOJ will oppose the use of unadjusted Redistricting data in the redistricting process if, as expected, the official Pl94-171 [sic] Redistricting data released by the Bureau has been adjusted through statistical sampling; therefore, declaratory relief is warranted. *See Bradley v. Saxbe*, 388 F. Supp. 53, 56 (D.D.C. 1974) (court recognized "real" threat to plaintiffs where the Attorney General "pointedly informed" public officials that prosecutions would be brought under a challenged statute).

For these reasons and for the reasons explained below, it is proper for a three judge panel of this Court to award the declaratory relief requested by the Commonwealth in this case at this time.[8]

---

[8] Defendants argue that a three judge panel lacks jurisdiction to consider Count II of the Commonwealth's Amended Complaint relating to DOJ's intended use of "PL94-171 Redistricting data." In making this contention, the defendants ignore the fact that the Commonwealth has filed this action pursuant to 28 U.S.C. §§ 2201 (the general Declaratory Judgment Act) and 2284, in addition to 42 U.S.C. § 1973c.

As discussed above, the standard for the award of a declaratory judgment associated with Count II is met in this case. Moreover, a three judge panel has the authority, pursuant to § 2284, to declare that the DOJ's expected use of adjusted Redistricting data when reviewing redistricting submissions is unconstitutional and unlawful. *See* 17 Wright, Miller & Cooper § 4235 at 606 (suggesting that § 2284(a) "ought to include all federal constitutional challenges that could result in a reapportionment"). *See also* 111 Stat. 2483, § 209 (authorizing the review of issues raised by the statistical adjustment of the

II. The Use Of Enumerated And Unadjusted Population Counts Does Not Constitute A Change Requiring Section 5 Preclearance.

DOJ has announced that where state legislation requires the use of population counts which have not been adjusted by statistical sampling, DOJ believes such legislation is subject to the preclearance requirements of Section 5. *See* Flores Affidavit. (Exhibit 8); Defendants' Memorandum at pp. 32-35. Based upon DOJ's representation, the Commonwealth has pursued this action. However, the Commonwealth's statutes requiring the use of enumerated and unadjusted Redistricting data when redistricting do not *in fact* change its electoral process, and therefore should not constitute a "change" in voting practices or process so as to require Section 5 preclearance.

The United States Supreme Court has stated simply the test to evaluate whether a change has occurred which would require Section 5 preclearance:

> To determine whether there have been changes with respect to voting, we must compare the challenged *practices* with those in existence

---

census by three-judge panels). Lastly, even if this Court concludes that § 2284 "does not provide for a direct exercise of three-judge court jurisdiction" over the Commonwealth's constitutional and statutory challenge to DOJ's intended use of adjusted population counts when reviewing state redistricting submissions, "concerns for the conservation of judicial resources and the avoidance of litigative entropy counsel for three-judge court treatment in this instance." *Commonwealth of Mass. v. Mosbacher*, 785 F. Supp. 230, 237 (D. Mass. 1992).

> before they were adopted. Absent relevant intervening changes, the Act requires us to use *practices* in existence on November 1, 1964, as our standard of comparison.

Presley v. Etowah County Commission, 502 U.S. 491, 495 (1992) (emphasis added). The Court used the term "practices" to describe the electoral law in place in the jurisdiction. Consideration is not limited to specific statutory statements, but specifically is directed to the practices actually in existence. Thus, contrary to the argument of Defendants, the conclusion that the Commonwealth's legislators may have had "discretion" to use some other form of data in past redistrictings is wholly irrelevant to the issue presented by Count I of the Amended Complaint because the *practice* in Virginia has always been to use enumerated, actual counts – not statistical estimates. *See* Defendants' Memorandum at p. 33.

There is no dispute that the Commonwealth historically has used Redistricting data which has not been adjusted by statistical sampling, traditionally provided every ten years by the Bureau, in drafting its plans for congressional redistricting and its plans for decennial state legislative redistricting. This was true in 1971, 1981 and 1991, and in drafting its plans for congressional redistricting and its plans for state legislative redistricting prior to November 1, 1964. *See* Austin Affidavit. (Exhibit 2). The statutes at issue, although newly enacted in the case of § 24.2-301.1, or modified in the case of § 24.2-304.1, simply require the continued use of Redistricting data that has not been statistically adjusted. They do not involve any new or changed electoral process. On

the contrary, they codify the process that has been in effect for years, and was in effect as of November 1, 1964.

Whether called reapportionment or redistricting, and whether conducted by localities or the Commonwealth as a whole, the decennial redistricting historically has required that the Commonwealth and its various governing bodies use as their base an actual enumeration. *See* 1975 Op. Va. AG at 331. The practical impact of this historical record, when considered in conjunction with observations of the Supreme Court, demonstrates that the Commonwealth is not seeking to change its practices, and therefore Chapter 884 does not require Section 5 preclearance. Logical support for the conclusion that there is no change may be found in the Supreme Court's discussion of the result of refusal to preclear statutes. Justice Scalia observed, "the sole consequence of failing to obtain preclearance is continuation of the status quo." *Bossier Parish*, ___ U.S. ___, 120 S.Ct. at 875. The Commonwealth therefore observes that since it historically has used unadjusted Redistricting data, and Chapter 884 requires it and its localities continue to do so, its electoral law is not being changed.

Delegate John H. Rust, Jr. (Fairfax), during a debate over floor amendments, stated the point clearly and succinctly. "Let me make it clear that the Bill that's before you, which is undone by the floor amendments, is not a change in our system. It is an affirmation of the same system that we have been used [sic] in redistricting since the census began." *See* Debate of House Bill 1486 before the Virginia House of Delegates, February 9, 2000, at 8-9. (Exhibit 9).

The change is not in the Commonwealth, in its electoral process, or in the application of its law. On the contrary, the change is with the Bureau. It is the Bureau that announced a plan to release modified population counts achieved through the use of statistical sampling. The Bureau, however, will also make available Redistricting data which has not been adjusted by sampling. It is the Commonwealth's intention not to change, but in harmony with its historical practice, to continue its reliance upon enumerated and unadjusted Redistricting data. In the absence of a change in the Commonwealth's electoral process, Section 5 preclearance is not required.

Furthermore, for the reasons explained above, the issues presented by Count I of the Amended Complaint (that is, the Commonwealth's "no change" contention) are ripe for resolution by this Court. The discretionary decision to adjust the Redistricting data which the Bureau intends to release as the official PL94-171 Redistricting data *has been made* and it is only barring highly unlikely *operational* difficulties that the statistically adjusted data will not be classified as the PL94-171 Redistricting data. Moreover, because of the compressed schedule associated with the Commonwealth's 2001 elections and redistricting process, the Commonwealth cannot afford to wait until after the PL94-171 Redistricting data has been released in the spring of 2001 to obtain a ruling regarding the enforceability of its statutes mandating the use of unadjusted Redistricting data in the redistricting process. A prompt ruling regarding this issue is necessary to allow timely elections to proceed.

Under the circumstances, the Commonwealth is entitled to a judgment *at this time* declaring that it may

enforce Va. Code § 24.2-301.1 and the amendment to Va. Code § 24.2-304.1 with or without the approval of the defendants.

III. The Use Of Enumerated And Unadjusted Population Counts In Redistricting Is Mandated By The Census Act And The Constitution Of the United States.

DOJ's intent to rely upon the Bureau's PL94-171 Redistricting data released in 2001, which almost certainly will be adjusted through the use of statistical sampling, when reviewing state redistricting plans pursuant to Section 5 is directly contrary to the Supreme Court's recent interpretation of the Census Act in *DOC v. House*, 525 U.S. 316, 119 S.Ct. 765.[9] Furthermore, contrary to Defendants' argument, DOJ's intention to rely upon the Bureau's 2001 PL94-171 Redistricting data when considering redistricting submissions *does* constitute a change in DOJ's Section 5 review process which is in conflict with the Census Act and violates the Constitution of the United States. *See* Defendants' Memorandum at p. 36. Next year is the first time that the Bureau is expected to release Redistricting data which has been adjusted by sampling as the official PL94-171 Redistricting data. Similarly, as discussed above, Defendants' contention that the

---

[9] Defendants' contention that no precedent exists which would support the Commonwealth's constitutional and statutory arguments regarding the use of statistical sampling in redistricting is wholly without merit. As explained above, *DOC v. House*, 525 U.S. 316, 119 S.Ct. 765 and additional Supreme Court opinions cited within this Memorandum reflect that there is clear precedent to support the Commonwealth's claims.

issue of the proper and lawful type of data to be used by DOJ in the Section 5 review process is not ripe for consideration by this Court is without merit. DOJ's expected use of adjusted Redistricting data when reviewing Virginia's redistricting submission is ripe for the consideration of this Court at this time because it is improbable that the PL94-171 Redistricting data will not be adjusted *via* statistical sampling and because if a ruling regarding the constitutional and lawful type of population data to be used in the redistricting process and in DOJ's Section 5 review of redistricting plans is not obtained promptly, it is highly likely that the citizens of the Commonwealth will be injured because of delays in the 2001 elections.[10]

---

[10] Defendants' argument that the Court should refrain from consideration of issues presented by the Amended Complaint until after the Bureau's release of the PL94-171 Redistricting data because of the supposed likelihood of a deluge of "expert testimony on a host of technical questions concerning claims about the methodological merits of the adjustment process" is also flawed. (Defendants' Memorandum at p. 29). The issues presented by the Commonwealth's Amended Complaint are almost entirely legal in nature and the Commonwealth does not intend, at this time, to present expert testimony regarding the legitimacy of the statistical methodologies which the Bureau may use in the adjustment process. The majority of the issues presented by this case relate to the legality and constitutionality of the use of statistical sampling in the process of redistricting – not the supposed accuracy or inaccuracy of the Bureau's methods. Similarly, the Court's consideration of the purpose and effect of Chapter 884 should not require consideration of the methods of statistical adjustment to be used by the Bureau in its creation of PL94-171 Redistricting data.

A. The Census Act Requires That Enumerated Counts be Used in Intrastate Congressional Redistricting/Reapportionment.

DOC v. House stands not only for the proposition that the Census Act precludes the use of adjusted population counts when determining the number of congressional representatives to which each state is entitled; it also supports the conclusion that the Census Act prohibits the use of adjusted figures in *intrastate* redistricting. The Court's decision makes this clear by the following:

(1) The Standing of the Individual Plaintiffs in *DOC v. House.*

The Supreme Court addressed in detail the standing of the parties who initiated the *DOC v. House* litigation in considering the nature of the relief ultimately granted by the Supreme Court in that case. *DOC v. House* actually involved two separate cases that were consolidated on appeal. One of these cases was initially filed by United States House of Representatives in this Court. *House of Representatives v. United States Department of Commerce*, 11 F. Supp. 2d 76 (D.C. 1998). The other case, *Glavin v. Clinton*, 19 F. Supp. 2d 543 (E.D. Va. 1998), was filed by several individual residents/citizens of varying states [hereinafter referred to as "the Glavin Plaintiffs"] in the United States District Court for the Eastern District of Virginia. The plaintiffs in both lawsuits challenged the use of data *adjusted* through the use of statistical sampling in the congressional reapportionment process. The United States District Courts of the Eastern District of Virginia and the District of Columbia both concluded that

the Census Act prohibited the use of population counts adjusted through the use of statistical sampling in congressional reapportionment. *Glavin v. Clinton*, 19 F. Supp. 2d at 553; *House of Representatives v. United States Department of Commerce*, 11 F. Supp. 2d at 104.

The Supreme Court affirmed the lower court's conclusion that the Glavin Plaintiffs had standing to pursue their claims for two reasons: (1) the "virtual certainty" that Indiana, the resident state of certain plaintiff(s) would lose a seat as a result of a sample based adjustment of the 2000 census; and (2) "the expected effects of the use of sampling on ***intrastate redistricting.***" (emphasis added). *DOC v. House*, 525 U.S. 316, 119 S. Ct. at 773-75.[11] The Court also reasoned that voters, such as the Glavin Plaintiffs, who live in areas that receive a low adjustment or no adjustment "will be injured by the [plan to use adjusted population counts for intrastate redistricting] because their votes will be diluted vis-à-vis residents of counties with larger "under-count" rates." *Id.*

---

[11] Interestingly, even though the case involved the interpretation of the Census Act, which would presumably only apply to congressional reapportionment/redistricting, when concluding that the Glavin Plaintiffs had standing to pursue their claims because of the "injuries" that they were likely to suffer if adjusted population counts were used in redistricting, the Supreme Court considered not only the effect of the use of adjusted data in the congressional redistricting process but also considered the use of such data in state legislative redistricting. *DOC v. House*, 525 U.S. 316, 119 S.Ct. at 774-75 (noting that "several of the States in which . . . [the Glavin Plaintiffs] are located require the use of federal decennial census population numbers for their state legislative redistricting").

The Supreme Court affirmed the District Court's holding that the Census Act prohibited the use of adjusted population counts in the congressional apportionment process and, in so ruling, concluded that *in order to redress the Appellees' injuries*, it was unnecessary to reach the constitutional issues raised by the Appellees (including the Glavin Plaintiffs). *Id.* At no point in its opinion did the Supreme Court indicate that it did not intend to redress *all* of the injuries claimed by the Glavin Plaintiffs in the case – including their claim of likely injury if adjusted numbers were used in intrastate redistricting. There was simply no need for the Court to even discuss the Appellees' second basis for standing, that is "the expected effects of the use of sampling on intrastate redistricting," *unless* the Court intended to reach the *redistricting component* of the reapportionment process *as well as* the allocation of seats among the states. Therefore, in holding that "the Census Act prohibits the proposed uses of statistical sampling in calculating the population for purposes of apportionment," the Court intended that "redistricting" be included within the Census Act's prohibition against the use of statistically adjusted data in the "apportionment" process. *See* 119 S. Ct. at 775 (finding that "expected intrastate vote dilution satisfies the injury-in-fact, causation, and redressibility requirements").

(2) The Term "Apportionment" Subsumes "Redistricting."

That the Supreme Court interpreted the Census Act to preclude the use of Redistricting data adjusted by

statistical sampling in intrastate redistricting when stating that they could not be used "for apportionment purposes" is further supported by the internal use of the term "apportionment" within the *DOC v. House* decision. For example, throughout the *DOC v. House* opinion, the Court refers to the Census Act's prohibition against the "uses" of statistically adjusted data for "purposes" of apportionment. 119 S.Ct. at 777-79 (emphasis added). If the Court viewed the Census Act as precluding the use of adjusted data *only* in the process of determining the number of representatives to which each state is entitled, there would have been no need for this constant use of the plural.

The Court's discussion of the 1957 and 1976 amendments to the Census Act also confirms that it considered "apportionment" to include "redistricting." The Court noted that the 1957 amendments authorized the Secretary of Commerce to use sampling when gathering certain "nonapportionment census information regarding population" but clearly "did not authorize the use of sampling procedures in connection with apportionment of Representatives." 119 S. Ct. at 776. The Court then went on to acknowledge that the 1976 amendments changed the 1957 law by requiring, when feasible, that the Secretary use statistical sampling when gathering nonapportionment population information but concluded that Census Act "maintains its prohibition on the use of statistical sampling in calculating population for purposes of apportionment." 119 S. Ct. at 777. In reaching the conclusion that the 1976 amendments did not eliminate the 1957 prohibition against the use of sampling in the apportionment process, the Court recognized that

> [a]t no point during the debates over these amendments did a single Member of Congress suggest that the amendments would so fundamentally change the manner in which the Bureau could calculate the population for purposes of apportionment. . . . This is true despite the fact that such a change would profoundly affect Congress by likely shifting the number of seats apportioned to some States *and altering district lines in many others.* (emphasis added) (citations omitted).

119 S.Ct. at 779. This observation of a lack of Congressional comment regarding the likely shift in the number of seats *apportioned* to some states *and* the likely alteration of *"district lines"* if the use of statistically adjusted data was permitted in the redistricting process by the 1976 amendments to the Census Act further reflects the Supreme Court's inclusion of redistricting in the definition of the term apportionment throughout the *DOC v. House* opinion.[12]

The historical use of the term "apportionment" by the Supreme Court, lower courts and legislative bodies also supports the conclusion that the Supreme Court meant to include "redistricting" when referring to "apportionment" in *DOC v. House* and that Congress

---

[12] The conclusion that the Supreme Court included redistricting in its definition of apportionment is further supported by the fact that Justice O'Connor, who drafted the majority opinion in *DOC v. House*, was also the author of the opinion in *Shaw v. Reno*, 509 U.S. 630 (1993), wherein she used the term "reapportionment" when clearly considering the "redistricting" process.

intended to preclude the use of statistically adjusted population counts in intrastate congressional redistricting pursuant to § 195 of the Census Act. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) (courts must "presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts" when interpreting such legislation); *United States v. Hunter*, 101 F.3d 82, 85 (9th Cir. 1996) ("We presume Congress was aware of [existing case law] when it enacted [legislation]"). Throughout the development of the Supreme Court's reapportionment jurisprudence, the Court has consistently used the term "apportionment" to include districting by directly and unequivocally referring to the drawing of district boundaries as "apportionment." *See, e.g., Shaw v. Reno*, 509 U.S. 630, 634 (1993) (using phrase "because the General Assembly's reapportionment plan affected the covered counties" when considering districting plan); *Davis v. Bandemer*, 478 U.S. 109, 113 (1986) (recognizing that the "division of the State into districts is accomplished by legislative enactment. . . . Reapportionment is required every ten years."); *Karcher v. Daggett*, 462 U.S. 725, 727 (1983) (recognizing that the issue before the Court was "whether an *apportionment* plan for congressional *districts* satisfies Art. I, § 2 of the Constitution") (emphasis added); *Mahan v. Howell*, 410 U.S. 315, 321 (1973) (noting that more flexibility "is constitutionally permissible with respect to state legislative *reapportionment* than in congressional *redistricting*") (emphasis added); *Gaffney v. Cummings*, 412 U.S. 735, 735 (1973) ("The questions in this case are whether the population variations among the election districts provided by a reapportionment plan . . . " were constitutional); *Wesberry*

v. Sanders, 376 U.S. 1, 4 (1964) (where the Court invalidated Georgia's "apportionment" of congressional districts); *Reynolds v. Sims*, 377 U.S. 533, 536-37 (1964) (considering the constitutionality of a "reapportionment plan" for the Alabama state legislature); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 635 (1964) (considering the "constitutional validity . . . of the apportionment of seats in the New York Legislature"); *Maryland Comm'n for Fair Representation v. Tawes*, 377 U.S. 656, 658 (1964) (considering constitutionality "of the apportionment of seats in the Maryland Senate"); *Davis v. Mann*, 377 U.S. 678, 680 (1964) (considering the constitutionality of the "apportionment of seats" in Virginia's state legislature).

Numerous lower Federal Court cases also reflect that the common usage of the term "reapportionment" incorporates "redistricting." *See, e.g., Texas Rural Legal Aid, Inc. v. Legal Servs. Corp.*, 940 F.2d 685, 688 (D.C. Cir. 1991) (discussing regulation that defined redistricting as "any effort, directly or indirectly, to participate in the revision or reapportionment of a legislative, judicial, or elective district"); *Taylor v. McKeithen*, 499 F.2d 893, 910-11 (5th Cir. 1974) ("[n]ot the least of the problems that would be created by representative apportionment is that the cartographer . . . cannot draw his meandering lines"); *Burns v. Gill*, 316 F. Supp. 1285, 1293 (D. Haw. 1970) (approving "two-tier apportionment plan" wherein all representatives and senators would first be apportioned among basis island units and then district lines would be drawn within the islands themselves). Thus, Federal courts have not historically distinguished apportionment from redistricting and, in effect, have correctly recognized that the overall process of "apportionment" actually subsumes

the process of "redistricting." *See also Garza v. County of Los Angeles*, 918 F. 2d 763, 770 (9th Cir. 1990) (recognizing that the "goal of each redistricting scheme since 1959" has been fragmentation when considering a county's "reapportionment plan"), *cert. denied*, 498 U.S. 1028 (1991); *Gorin v. Karpan*, 775 F. Supp. 1430, 1443 (D. Wyo. 1991) ("Fundamentally, redistricting versus reapportionment is a distinction without a difference"); *Dixon v. Hassler*, 412 F. Supp. 1036, 1038 (W.D. Tenn.) (recognizing that "Congressional Districts were malapportioned"), *affirmed*, 429 U.S. 934 (1976).

States have also construed "apportionment" as a term that subsumes redistricting. Today, the overwhelming majority of states use some form of the term "apportionment" in their statutes or constitutional provisions dealing with the drawing of representative districts. *See, e.g.*, ALA. CODE § 11-44B-10 (1975); ALASKA CONST. art. XIV, § 1; ARIZ. REV. STAT. § 16-1103 (2000); ARK. CODE ANN. § 14.14.403 (Michie 1998); CAL. ELEC. CODE § 13108 (West 1996); COLO. CONST. art. V, § 48; CONN. GEN. STAT. ANN. § 9-169b (West 1994); DEL. CODE ANN. tit. 29, § 805 (1997); FLA. CONST. art. III, § 16; GA. CONST. art. III, § 2, ¶2; HAW. REV. STAT. § 25-2(b) (1993); IDAHO CONST. art. III. § 5; IND. CONST. art. 4, § 5; IOWA CONST. art. III, § 35; KAN. STAT. ANN. § 4-502 (1993), KAN. CONST. art. VI, § 3; LA. REV. STAT. ANN. 18 § 1951 (West 1999); ME. CONST. art. 4, pt. 2, § 2; MD. CONST. art. III, § 5; MASS. CONST. amend. art. 101; MICH. STAT. ANN. § 3.51 (Law. Co-op. 1994); MINN. CONST. art. IV, § 3; MISS. CONST. art. XIII, § 254; MO. CONST. art. III, § 2; MONT. CONST. art. V,

§ 14; NEB. CONST. art. III, § 5; NEV. CONST. art. IV, § 5; N.H. CONST. pt. 2, art. 9; N.J. CONST. art. 4, § 3, ¶1; N.M. CONST. art III, § 3; N.Y. CONST. art. III, § 5; N.C. CONST. art. II, § 5; N.D. CENT. CODE § 54-03-01.5 (1989); OHIO CONST. art XI, § 1; OKLA. CONST. art. V, § 9A; OR. REV. STAT. § 188.010 (1991); 1994 Pa. Legis. Serv. 22 § 2201 (West); R.I. CONST. art. VII, § 1; S.C. CODE ANN. § 7-19-50 (Law. Co-op 1976); S.D. CODIFIED LAWS § 2-15-2 (Michie 1992); TENN. CODE ANN. § 2-16-102 (1994); TEX. REV. CIV. STAT. ANN. art. 197c (West 1969); UTAH CONST. art. IX, § 1; VT. CONST. ch. II, § 73; WASH. CONST. art. 22, § 1; VA. CODE § 24.2-300; W. VA. CODE § 1-2-3 (1999); WIS. STAT. ANN. § 4.001 (West 1996); WYO. CONST. art. III, § 50. *See also* Robert G. Dixon, Jr., *Democratic Representation: Reapportionment in Law and Politics*, Oxford University Press, New York, (1968) p. 3 (wherein Dixon expresses his view that redistricting is a subset of reapportionment).[13]

Because the courts and legislatures have consistently used the term "apportionment" to include "redistricting" when discussing or referring to redistricting plans, it is clear that the Supreme Court intended to interpret the Census Act to prohibit the use of statistically adjusted population counts in intrastate redistricting in *DOC v. House*. It is also correct to conclude that Congress, by

---

[13] Congress also uses the terms interchangeably in Title 28 when it provides for a three-judge panel review of issues relating to the "apportionment of congressional districts or the apportionment of any statewide legislative body." 28 U.S.C. § 2284.

using the term "apportionment" in § 195 of the Census Act, intended to prohibit the use of adjusted data when in the congressional redistricting process. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. at 184-85; *United States v. Hunter*, 101 F.3d at 85 (Congress is presumed to be aware of existing case law when drafting legislation).

(3) A Rational Interpretation of the Census Act Supports the Conclusion that the Use of Adjusted Population Counts in Redistricting is Prohibited.

Undoubtedly, when reaching its decision in *DOC v. House*, the Supreme Court was aware of the judicial rule of statutory construction which presumes that Congress enacted *rational* legislation when it passed the Census Act. *Peterson v. Lindner*, 765 F.2d 698, 705 (7th Cir. 1985) (citing *Hodel v. Indiana*, 452 U.S. 314, 322 (1980)); *Commissioner of Internal Revenue v. Brown*, 380 U.S. 563, 571 (1965). To have interpreted the Census Act as allowing the use of statistically adjusted population counts in intrastate redistricting while at the same time prohibiting the use of statistical sampling for purposes of determining the number of Representatives to which each state is entitled, the Court would have had to ignore this fundamental rule of statutory construction.

"The mathematics of sampling and estimation are such that . . . the level of sampling error, relative to the size of the population counted, will increase as one moves to smaller and smaller geographical units." Preparing for the 2000 Census, *Interim Report II*, ed. Andrew

A. White and Keith F. Rust, by Panel to Evaluate Alternative Census Methodologies, (Washington, D.C.: National Academy Press, 1997), 11 (Exhibit 14). As one moves down the geographic hierarchy – from regions – to entire states – to counties and cities – to smaller geographic areas, the numbers are likely to become less and less accurate. It is for this reason, among others, that the Secretary of the Department of Commerce rejected the option of using statistical sampling following the 1990 census. The Supreme Court validated the Secretary's concerns in this regard in *Wisconsin v. City of New York*, 517 U.S. 1, 11 (1996).[14]

Given the larger negative impact that the use of statistically adjusted Redistricting data is likely to have upon intrastate redistricting – due to increased levels of inaccuracy as the sample size decreases – it would have been absurd and irrational for Congress to have authorized the use of Redistricting data adjusted through the use of statistical sampling in intrastate redistricting while at the same time prohibiting the use of statistically adjusted data for allocating Representatives among the states. Surely, Congress did not intend such an absurd result when it enacted legislation authorizing the use of

---

[14] The "PES-based adjustment" rejected by the Secretary in connection with the 1990 census is quite similar to the adjustments planned by the Bureau in connection with the 2000 census. *See* UNITED STATES DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, REPORT TO CONGRESS – THE PLAN FOR CENSUS 2000 (Originally Issued July 1997; Revised and Reissued August 1997) (Exhibit 5); UPDATED SUMMARY: CENSUS 2000 OPERATIONAL PLAN (February, 1999, U.S. Department of Commerce) (Exhibit 6).

sampling for certain limited purposes and the Supreme Court did not interpret the Census Act as permitting this absurdity in *DOC v. House*.

Because the Census Act requires states to use population counts unadjusted by sampling in intrastate redistricting, the Commonwealth is entitled to a judgment declaring that its statutes mandating the use of enumerated and unadjusted Redistricting data are not subject to the preclearance requirements of Section 5.[15] These statutes do nothing more than codify what is already legally required. The Commonwealth also is entitled to a judgment declaring that DOJ is prohibited, based upon the Census Act, from using statistically adjusted population counts to be classified by the Bureau as the official PL94-171 Redistricting data when reviewing the Commonwealth's future congressional redistricting plans pursuant to Section 5.

B. The Constitution Prohibits the Use of Statistically Adjusted Counts in Redistricting.

Even if the Census Act did not prohibit the use of population counts adjusted through statistical sampling in redistricting, the Commonwealth would be prohibited from using such data in congressional, state and local redistricting/reapportionment pursuant to the Constitution of the United States.

---

[15] It would also be unreasonable to require the Commonwealth to use statistically adjusted population counts in its state legislative and local reapportionment/redistricting process when it is legally prohibited from using the same type of data for federal redistricting.

(1) Congressional Redistricting.

a. An "Actual Enumeration" Must Be Used For Congressional Redistricting.

In *Wesberry v. Sanders*, 376 U.S. 1 (1964) [hereinafter "*Wesberry*"], the Supreme Court recognized the constitutional mandate imposed upon the States to create congressional districts which, to the extent possible, ensure equality in the voting strength of all voters – that is, districts which ensure "one person, one vote." *Id.* at 18. The Court considered the "Great Compromise" reached by the Framers allowing for equal representation in the Senate for all States but providing for population based representation in the House of Representative [sic] and reasoned that:

> It is in the light of such history that we must construe Art. I, § 2, of the Constitution, which, carrying out the ideas of Madison and those of like views, provides that Representatives shall be chosen "by the People of the several States" [clause 1 of Art. I, § 2] and shall be "apportioned among the several States . . . according to their respective Numbers [clause 3 of Art. I, § 2]."....
>
> While it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives. That is the high standard of justice and common sense which the Founders set for us.

Id. at 17-18. As reflected above, the Court interpreted clauses 1 and 3 of Article I, § 2 together rather than

construing the phrase "apportioned among the several States . . . according to their respective numbers" as applying only to the number of Representatives to which each State is entitled. *See also Kilpatrick v. Preisler*, 394 U.S. 526 (1969). Thus, the Court acknowledged that the "apportionment" clause in Article I, § 2 reflects the intent of the Framers that congressional districts within the states are to be drawn to ensure equality in voting strength. A practical, reasonable and harmonious construction of all of the clauses in Article I, § 2 leads to the conclusion that the "respective numbers" referred to in Article I, § 2, cl.3, and considered by the Supreme Court when determining whether or not a state's congressional districts provide for "one man, one vote," must also be defined by Article I, § 2 – that is, they must be based upon the "actual enumeration" required by clause of Article I, § 2.[16] *See Prout v. Starr*, 188 U.S. 537, 543 (1903) ("The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity"); *Brown v. Walker;* 161 U.S. 591, 595-96 (1896) (recognizing that the Court must construe the Constitution's privilege against self-incrimination in a "practical" manner so that the privilege does not completely obstruct the administration of criminal justice); *Woodson v. Murdock*, 89 U.S. 351, 368-69 (1874) ("every clause in every

---

[16] Again, consistent with past practice and judicial precedent discussing "one person, one vote," when referring to the "actual enumeration" used to create the unadjusted Redistricting data which should be used in the intrastate redistricting process, the Commonwealth does not intend to refer the overseas population. *See supra* note 3.

constitution" must be given "a reasonable interpretation"); *Tom v. Sutton*, 533 F. 2d 1101, 1105-06 (9th Cir. 1976) ("Every provision in a constitution must be interpreted in light of the entire document . . . and all constitutional provisions are of equal dignity and, if possible, should be construed in harmony with each other."); *Staebler v. Carter*, 464 F. Supp. 585, 597 (D.D.C. 1979) ("Some constitutional provisions, such as the First Amendment, have a preferred standing, but otherwise all parts of the Constitution are of equal validity and weight and should be construed in light of the principle that the entire Constitution must be regarded as one whole").

b. The Actual Enumeration Is Not An Estimate.

The estimated population counts which the Bureau intends to release as its PL94-171 Redistricting data by April of 2001 stand in contrast to the Constitution's simple but clear requirement that representation is to be based upon an "actual Enumeration" which "count[s] . . . the whole number of persons." U.S.Const. Article I, § 2, amend. XIV, § 2. Where, as here, the language of the Constitution is clear, the Supreme Court has consistently held that the plain language of the Constitution must be given effect and may not be contravened. *See, e.g., Polluck v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 618 (1895) ("The words of the constitution are to be taken in their obvious sense. . . . "); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824) ("As men, whose intentions require no concealment, generally employed the words which most directly and aptly express the ideas they intend to convey, the

enlightened patriots who framed our constitution, and people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said."). Because the phrase "actual enumeration" is quite straightforward and conducive to simple understanding, such is the construction which it should be given.

The plain meaning of the "actual enumeration" referred to in Article I, § 2 was clear and unambiguous at the time of the drafting of the Constitution. In 1789, "enumerate" meant to "count" and plainly did not mean to estimate. *See, e.g.*, Samuel Johnson, A Dictionary of the English Language (1773) (defining "enumerate" to mean "to reckon up singly, to count over distinctly"); John Walker, A Critical Pronouncing Dictionary (1794) (defining "enumerate" as "to reckon up singly, to count over distinctly"); Thomas Sheridan, A General Dictionary of the English Language (1780) (defining "enumerate" to mean "to reckon upon singly, to count over distinctly"); Noah Webster, American Dictionary of the English Language (1828) (defining "enumerate" to mean "to count or tell, number by number; to reckon or mention a number of things, each separately"). Both "enumerate" and "enumeration" derive from the Latin word "enumerare" which meant to "count out." Barnhart Dictionary of Etmology [sic] (1988). Indeed, the word "count" is often defined as "enumerate." *See* Noah Webster, American Dictionary of the English Language (defining the word "count" to mean "to tell or name one by one, or by groups, for the purpose of ascertaining the whole number of units in a collection; to number; to enumerate").

In his concurring opinion in *DOC v. House*, Justice Scalia considered several of the definitions discussed above when concluding that "[i]t is . . . unquestionably doubtful whether the constitutional requirement of an 'actual enumeration,' Art. I, § 2, cl. 3, is satisfied by statistical sampling." *DOC v. House*, 525 U.S. 316, 119 S.Ct. at 779-782 (J. Scalia concurring). He noted that:

> [t]he notion of counting "singly," "separately," "number by number," "distinctly," which runs throughout these definitions is incompatible (or at least *arguably* incompatible, which is all that needs to be established) with gross statistical estimates.

(emphasis in original) 119 S. Ct. at 781.

Justice Scalia also criticized the analysis of Justice Stevens' dissent regarding the "purpose" of the census clause and expressed grave concerns regarding potential partisan manipulation of the census when discussing the likely unconstitutionality of using adjusted counts in the reapportionment process:

> Justice Stevens reasons from the *purpose* of the census clause: "The census is intended to serve the constitutional goal of equal representation. . . . That goal is best served by the use of a 'Manner' that is most likely to be complete and accurate.". . . . That is true enough, and would prove the point if either (1) *every* estimate is more accurate than a headcount, or (2) Congress could be relied upon to permit *only* those estimates that are more accurate than headcounts. It is metaphysically certain that the first proposition is false, and morally certain that the second is. To give Congress the power, under the guise

> of regulating the "Manner" by which the census is taken, to select among various estimation techniques having credible (or even incredible) "expert" support, is to give the party controlling Congress the power to distort representation in its own favor. In other words, genuine enumeration may not be the most accurate way of determining population, but it may be the most accurate way of determining population with minimal possibility of partisan manipulation. . . .
>
> For reasons of text and tradition, fully compatible with a constitutional purpose that is entirely sensible, a strong case can be made that an apportionment census conducted with the use of "sampling techniques" is not the "actual Enumeration" that the Constitution requires.

119 S. Ct. at 781-82.

Justice Scalia was joined by Chief Justice Rehnquist and Justices Thomas and Kennedy in this portion of his concurrence, reflecting the clear view of at least four Supreme Court Justices that the "actual enumeration" required by Article I, § 2 does not contemplate the use of statistical sampling. Furthermore, to date, every case from the Supreme Court dealing with the principle of equality in voting strength has been based upon enumerated data unadjusted by sampling. In fact, the Supreme Court has specifically refused to consider the estimated "undercount" when determining whether a state's congressional redistricting plan fulfilled the requirement of "one man, one vote." *Karcher v. Daggett*, 462 U.S. 725, 738-39 (1983). Given these indicators from the Supreme Court, it is highly likely that the Court would reject any

plan for redistricting which is based upon the Bureau's Redistricting data which has been adjusted through statistical sampling.

The conclusion that the "actual enumeration" contemplated by Article I, § 2 can be based upon a statistical estimate is also contrary to the Framers' intent. The first apportionment of Congress by the Constitutional Convention was based on an *estimate* of our nation's population. The "actual enumeration" requirement was intended to *foreclose, from that point forward,* using such a "conjectural rule" as a basis for congressional representation in the future. 1 Records of the Federal Convention of 1787, 602 (Max Farrand ed., 1911).

Defendants, however, are likely to argue that current statistical estimates are no longer "conjectural" but, instead, have reached a level of precision never envisioned by the Framers. Defendants may also contend that the Bureau's statistical estimates should be considered an "actual enumeration" of the population if it can be shown that they are more accurate than the headcount. *See* Accuracy and Coverage Evaluation, Statement on the Feasibility of Using Statistical Methods to Improve the Accuracy of Census 2000 at p. 1, attached as Attachment 1 to the Defendants' Memorandum (where the Bureau notes that it "expects it can produce more accurate data by supplementing traditional enumeration procedures with statistical sampling"). But the confidence that either the Bureau or the defendants have in the estimated PL94-171 Redistricting data does not change the fact that they are estimates and not counts. By analogy, congressional elections are based on a count of the ballots cast for

a candidate. Obviously, this process is often not completely accurate because ballots may be counted incorrectly or even lost. Regardless, no court would ever allow congressional election results to be altered based upon a sophisticated, statistical adjustment which "accurately" estimates the number of missing ballots and the voting patterns of missing voters. Similarly, the Constitution does not authorize drawing congressional districts based upon estimates that experts may consider reliable, and for the same reason. Even if a statistical computation is completely honest, the estimate (and corresponding adjustment) necessarily is based on assumptions not susceptible to empirical proof or disproof. As such, statistical estimates and adjustments are inherently subject to manipulation and/or expert judgments that courts (or others) cannot reliably verify. By definition, then, a statistical adjustment cannot constitute the permanent, precise standard required by the Framers or contemplated by the Supreme Court when requiring districts which achieve "one person, one vote."

In conclusion, a logical, reasonable and harmonious construction of the Constitution, leads to the conclusion that an "actual enumeration" must be used, not only for determining the number of Representatives to which each state is entitled, but also in the process of intrastate, congressional redistricting. Furthermore, the "actual enumeration" required by Article I, § 2 constitutes an actual count of the population rather than a statistical estimate which is subject to manipulation. Because the Constitution requires the states to use enumerated population counts, unadjusted by statistical sampling, in their congressional redistricting process, the Commonwealth's

statute codifying this constitutional requirement should not be subject to Section 5 preclearance. For the same reason, Defendants should be precluded from relying upon statistically adjusted Redistricting data when reviewing the Commonwealth's congressional redistricting plans pursuant to Section 5.

(2) State Legislative and Local Redistricting.

The Supreme Court has also held that the Equal Protection Clause of the Fourteenth Amendment to the Constitution requires the States and localities to apportion their state legislative and locality districts "substantially on a population basis." *Mahan v. Howell*, 410 U.S. 315, 321 (1973) (citing *Reynolds v. Sims*, 377 U.S. 533 (1964)). *See also Board of Estimate of City of New York v. Morris*, 489 U.S. 688 (1988) (principle of "one man, one vote" applies regarding the creation of districts for the purpose of electing members of New York City Board of Estimate); *Rogers v. Lodge*, 458 U.S. 613 (1982) (doctrine of unconstitutional dilution of voting rights applies to counties). While the Court has held that "the basic constitutional principle [of] equality of population among the districts" does apply to the process of state legislative and local redistricting, the Court has also held that "more flexibility [is] constitutionally permissible with respect to state legislative reapportionment than in congressional redistricting." *Mahan v. Howell*, 410 U.S. at 321 (citing *Reynolds v. Simms* [sic], 377 U.S. at 578).

As with the congressional redistricting cases, to date, all of the cases considering the constitutionality of state

legislative or locality districts have used actual, enumerated and non-estimated population counts when reviewing such districts. Furthermore, a reasonable, logical and consistent construction of Article I, § 2, together with the Fourteenth Amendment's Equal Protection Clause, supports the conclusion that population counts which have been made pursuant to an "actual enumeration" must be used when redrawing the boundaries of state legislative and local governmental districts.[17] *See Prout v. Starr*, 188 U.S. at 543 (all portions of the Constitution of the United States are to be interpreted together "as one instrument"); *Woodson v. Murdock*, 89 U.S. at 368-69 (all clauses of constitutions should be given a "reasonable interpretation"); *Staebler v. Carter*, 464 F. Supp. at 597 (various provisions of the Constitution are of "equal validity and weight" and "the Constitution must be regarded as one whole."). This is especially so given that the Bureau intends not only to add, but also to *delete* persons who

---

[17] When arguing that the Constitution requires enumerated data, not adjusted through statistical sampling, to be used in the state and local redistricting process, the Commonwealth does not intend to imply that states are required to use the data provided by the Bureau in redistricting. The Supreme Court has indicated in several cases that states may be allowed to rely upon population counts other than those provided by the Bureau in the process of state legislative redistricting. *See Burns v. Richardson*, 384 U.S. 73 (1966); *Ely v. Klahr*, 403 U.S. 108 (1971). However, the Court has only expressed a willingness to approve plans based upon alternative population counts when the results were not substantially different from the population deviations which would have occurred through the use of total population counts (at that time unadjusted through statistical sampling) provided by the Bureau.

already have been counted, under their process of statistical sampling. *See* note 6, *supra*.

The Equal Protection Clause can and should be construed consistently with Article I, § 2. *Prout v. Starr*, 188 U.S. at 543; *Staebler v. Carter*, 464 F. Supp. at 597. Because, as explained above, Article I, § 2 requires that enumerated population counts, unadjusted *via* statistical sampling be used in the process of congressional redistricting, a consistent and harmonious interpretation of Article I, § 2 and the Equal Protection Clause supports the conclusion that the Constitution requires actually enumerated data, not adjusted through statistical sampling, to be used in the process of state legislative and locality redistricting.

In addition, it would require a completely unreasonable construction of the Equal Protection Clause to conclude that the states and localities are obligated to use statistically adjusted population counts in their redistricting process when the use of such data is prohibited by Article I, § 2 in determining the number of Representatives to which each state is entitled or when drawing congressional districts within the states. As noted above, the relative degree of sampling error is likely to increase as the size of the sample decreases. Section III(A)(3), *supra*. Thus, as one considers the use of statistical adjustments in progressively smaller geographical areas, it is probable that the statistically adjusted numbers will become less and less accurate. Obviously, it would be completely unreasonable to conclude that the Constitution (or even the Voting Rights Act) requires states and localities to use data which is likely to be inaccurate in their state legislative and locality redistricting process,

when the states are precluded from relying upon the same statistically adjusted data for congressional redistricting.[18] Such an unreasonable interpretation should be rejected by this Court. *Woodson v. Murdock*, 89 U.S. at 368-69.

In sum, the important issue with respect to the constitutionality and enforceability of Va. Code §§ 24.2-301.1 and 24.2-304.1 and the constitutionality of the type of population data to be used by DOJ when reviewing future redistricting submissions, should be consideration of the database which will be used by the courts for the assessment of one-person-one-vote. DOJ should not be allowed to use a database different from that used for the assessment of one-person-one-vote for the assessment of compliance under Section 5. Furthermore, as explained in more detail below, DOJ's use of any database different from that used for the assessment of one-person-one-vote in the past, as has been the case since the passage of the Voting Rights Act, would not be a measurement of retrogression but, instead, would be an attempt to use the Section 5 preclearance process as improper leverage to force the Commonwealth to adopt an illegal redistricting policy. This is *exactly* the type of conduct by DOJ which the Supreme Court invalidated in *Bossier Parish*, ___ U. S. ___, 120 S. Ct. at 871 and *Shaw v. Reno*, 509 U.S. 630 (1993).

Thus, because the Constitution requires the Commonwealth and localities to use enumerated population counts unadjusted by statistical sampling in the process

---

[18] The Voting Rights Act must also be construed rationally. *Commissioner of Internal Revenue v. Brown*, 380 U.S. at 571 (statutes should be construed to avoid absurd results).

of state legislative and local redistricting, the Commonwealth should not be required to have its statutes memorializing this constitutional requirement precleared. For the same reason, Defendants should be precluded from relying upon statistically adjusted data when reviewing plans for state legislative and locality districts pursuant to Section 5.

IV. The Use Of Enumerated And Unadjusted Population Counts Does Not Have A Retrogressive Purpose Or Effect.

Should this Court determine that Section 5 preclearance of the Commonwealth's codification of the use of an unadjusted Redistricting data is necessary, its conclusion should be that Chapter 884 should be precleared. Contrary to Defendants' arguments, resolution of this issue is ripe for resolution by this Court because it can be established *now* that such changes have neither a retrogressive purpose nor effect and therefore satisfy the requirements of Section 5. *See Bossier Parish*, ___ U.S. ___, 120 S.Ct. 866 (2000); *Beer v. United States*, 425 U.S. 130 (1976).

In *Beer*, the Court explicitly addressed Section 5 as it applied to any relevant effect on voting rights. The Court examined both the language and the purpose of Section 5 and determined that electoral process changes would satisfy the requirements of Section 5 where they did not have a "retrogressive" effect. *Beer*, 425 U.S. at 141. "In other words the purpose of Section 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial

minorities with respect to their effective exercise of the electoral franchise." *Beer*, 425 U.S. at 141. The points of comparison, from prior to present, were emphasized by the Supreme Court in *Bossier Parish*, when the Court stated: "[a]s we have repeatedly noted, in vote-dilution cases § 5 prevents nothing but backsliding, and preclearance under § 5 affirms nothing but the absence of backsliding." *Bossier Parish*, ___ U. S. ___, 120 S. Ct. at 875.

In *Bossier Parish* the Supreme Court determined that the same construction that it applied to the "effect" of Section 5 in *Beer* should be applied when examining the purpose of any electoral process change. 120 S.Ct. at 871. The Court clearly stated that "[w]hen considered in light of our long standing interpretation of the 'effect' prong of Section 5 in its application to vote dilution claims, the language of § 5 leads to the conclusion that the 'purpose' prong of Section 5 covers only retrogressive dilution." *Id.*

The purpose of Chapter 884 was clearly stated by Delegate Rust. *See* Debate of House Bill 1486 before the Virginia House of Delegates, February 9, 2000, at 8-9 (Exhibit 9). It was an effort not to change the system, but to maintain the system that had been used for years. This purpose is reinforced by the comments of Senator Forbes in explaining why Chapter 884, requiring the use of actual population counts, was necessary. "It's not a matter of preference, it is a fact that for 200 years we have used actual enumeration. That if you look in the Commonwealth of Virginia, go back, pick your time, 1970, 1980, 1990, we used it." *See* Debate of House Bill 1486 before the Senate of Virginia, March 6, 2000 at 19 (Exhibit 10). The evidence demonstrates that as the Virginia General Assembly evaluated the propriety of Chapter 884,

House Bill 1486, the legislators sought to maintain the status quo. They recognized that actual population counts, not adjusted through statistical sampling, had been used for decennial redistricting in the Commonwealth for many years and that it was most appropriate to continue their use upon completion of the 2000 census.

The purpose of the legislation was certainly not discriminatory, and there is indeed no evidence to indicate that it was. Likewise, there is no evidence that the legislation had a retrogressive purpose. On the contrary, the only evidence is that the Commonwealth's legislature sought to avoid change, to maintain the status quo, and to steer clear of any retrogressive purpose that might be perceived from a change from use of an unadjusted population count.

The discussion in the legislature also helps to demonstrate the lack of any retrogressive effect from this legislation. The Commonwealth has made use of unadjusted Redistricting data for many years. While such enumeration may not be perfectly accurate, the Commonwealth's legislature sought to make use of the most unadulterated data available. Members of the legislature recognized that where statistical modifications were made, the accuracy of the information, and therefore the effect which might flow from the use of this adulterated information, would be unpredictable. *See* Debate of House Bill 1486, March 6, 2000 at 18 (Exhibit 10). Members of the legislature recognized that where prior redistricting and reapportionment relied upon unadjusted Redistricting data, the greatest assurance of avoiding any retrogressive effect was through the continued use of unadjusted Redistricting

data. They sought, to the extent possible, to maintain continuity in the electoral process.

The Commonwealth created legislation that looked to the prior decennial census, and the prior efforts at redistricting and reapportionment, and was guided by its historical pattern of using the most unadulterated information available. DOJ asserts that it will make its retrogression analysis by examining Virginia's plan, or any other such plan, in relation to the adjusted data generated by the Bureau. Exhibit C to Flores Affidavit (Exhibit 8). However, that is an improper analysis. To use a familiar phrase, the comparison should be of apples to apples. The Supreme Court has instructed that the comparison is of old apples to new apples. *See Bossier Parish* ___ U.S. ___, 120 S. Ct. at 871. DOJ states it intends to compare new apples to new oranges. It simply is not the proper analysis. When a comparison of past to present is made, the comparison will show a continuation of the status quo. Where that is the case, there will not be a retrogressive effect. Such continuity demonstrates the nonretrogressive purpose, and ensured the nonretrogressive effect, of the legislation.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss or Motion to Stay should be denied. Contrary to the defendants' contentions, the Commonwealth has stated claims upon which relief can and should be granted in its Amended Complaint, the issues presented by the Amended Complaint are ripe for the consideration

of this Court, and a three judge panel has jurisdiction to consider each of the Commonwealth's claims.

In summary, the Commonwealth respectfully asks this Court to enter a judgment declaring that the enforcement of Va. Code §§ 24.2-301.1 and 24.2-304.1, as enacted and amended by 2000 Va. Acts ch. 884, will not violate Section 5 of the Voting Rights Act of 1965 and does not require Section 5 preclearance because (i) these statutes do not constitute a "change" subject to Section 5 and (ii) the use of unadjusted Redistricting data in the process of intrastate redistricting is required by the Constitution of the United States and the Census Act. In the alternative, the Commonwealth requests that a judgment be entered declaring that it may enforce these statutes without impediment on account of Section 5 of the Voting Rights Act of 1965, as amended, because they do not have the purpose nor the effect of denying or abridging the right to vote on account of race or color.

The Commonwealth also asks the Court to enter a judgment declaring that DOJ's announced plan to use the adjusted population counts provided by the Bureau as a basis for reviewing state redistricting plans pursuant to Section 5 is unconstitutional and violates the Census Act.

Finally, as conceded by Defendants, the Commonwealth requests that this Court enter a judgment declaring that Va. Code § 24.2-309.1, as amended by 2000 Va. Acts ch. 884, does not have the purpose or the effect of denying or abridging the right to vote on account of race or color, and that said statute may be enforced by the

Commonwealth without impediment on account of Section 5.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

By: /s/ Frank S. Ferguson
Counsel

Mark L. Earley
Attorney General of Virginia

Randolph A. Beales
Chief Deputy Attorney General
Virginia State Bar No.: 27055

Frank S. Ferguson
Deputy Attorney General
Virginia State Bar No.: 17843

James W. Hopper
Senior Assistant Attorney General
District of Columbia Bar No: 387719

Gregory E. Lucyk
Senior Assistant Attorney General
Virginia State Bar No.: 19754

A. Ann Berkebile
Assistant Attorney General
Virginia State Bar No.: 31901

E. Scott Moore
Assistant Attorney General
Virginia State Bar No.: 36045

Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-2071

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum of Points and Authorities Opposing Defendants' Motion to Dismiss or Motion to Stay and in Support of Motion for Summary Judgment was served on the 29th day of June, 2000, by UPS overnight delivery, upon Joseph D. Rich, Robert A. Kengle and Stephen B. Pershing, counsel for the defendants, at the Voting Section, Department of Justice, 320 First Street, N.W., Washington D.C. 20534; and upon the following counsel for applicants for intervention: Paul M. Smith, JENNER & BLOCK, 601 13th Avenue N.W., Suite 1200, Washington, D.C. 20005; J. Gerald Hebert, Esq., J. GERALD HEBERT, P.C., 5019 Waple Lane, Alexandria, VA 22304; Edward Still, Esq., Lawyers' Committee for Civil Rights Under Law, 1401 New York Avenue, N.W., Suite 400, Washington, D.C. 20005.

/s/ Frank S. Ferguson

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

CIVIL ACTION NO. 1:00CV00751
JUDGE: Henry H. Kennedy

AFFIDAVIT OF CAMERON QUINN

The undersigned, CAMERON QUINN, hereby declares under penalties of perjury, 28 U.S.C. § 1746, as follows:

1. I am confident to testify to the matters sworn to by me in this Affidavit. I swear and certify that the statements are true to the best of my knowledge and belief.

2. Currently, I hold the position of Secretary of the State Board of Elections for the Commonwealth of Virginia. I have held this position since 1999. Before becoming Secretary, I held the position of Deputy Secretary of the State Board of Elections for several months in 1998 and into the beginning of 1999.

3. In my capacity as Secretary of the State Board of Elections for the Commonwealth of Virginia, I am aware that Virginia is one of only a few states holding odd year elections for state executive and legislative offices in 2001.

4. Before elections can be held in Virginia in 2001, new election districts must be drawn and preclearance under Section 5 of the Voting Rights Act of 1965, as amended ("Section 5") must be obtained in a compressed schedule necessary to accommodate candidate filings, nomination by primary or convention, and a vigorous election campaign, all before the conduction of general elections in November of 2001.

5. It is my understanding that at the present time, the United States Bureau of the Census ("the Bureau") has concluded it is operationally feasible to adjust census population counts through statistical sampling, and that the Bureau plans to release statistically adjusted population counts as "PL94-171 Redistricting Data" in the spring of 2001, barring any unanticipated operational difficulties. Such data will conflict with the enumerated, unadjusted and non-estimated population counts which Virginia's state legislature and localities are required use in Virginia's redistricting process pursuant to Va. Code §§ 24.2-301.1 and 24.2-304.1.

6. It is also my understanding that the United States Department of Justice ("DOJ") expects to use the PL94-171 Redistricting Data, as adjusted through the use of statistical sampling, when reviewing Virginia's redistricting submissions under Section 5 in 2001.

7. In order to allow timely elections to proceed Virginia in November of 2001, a judicial determination regarding the enforceability of Va. Code §§ 24.2-301.1 and 24.2-304.1 and the legality and constitutionality of DOJ's expected use of population counts adjusted through the use of statistical sampling when reviewing Virginia's

redistricting submissions pursuant to Section 5 must, of necessity, be decided promptly and finally.

8. If a judicial determination regarding the enforceability of Va. Code §§ 24.2-301.1 and 24.2-304.1 and the legality and constitutionality of DOJ's expected use of population counts adjusted through the use of statistical sampling when reviewing Virginia's redistricting submissions pursuant to Section 5 is delayed until the spring of 2001, after the Bureau releases the PL94-171 Redistricting Data which will be adjusted through the use of statistical sampling barring unforeseen and highly unlikely circumstances, it will be virtually impossible for timely elections to proceed in Virginia in November of 2001.

Declared and signed under parties of perjury, 28 U.S.C. § 1746, this 27th day of June, 2000.

/s/ Cameron P. Quinn

[SEAL]

UNITED STATES DEPARTMENT OF COMMERCE
Bureau of the Census
Washington, DC 20233-0001

FEB 08 2000

CENSUS 2000 DECISION MEMORANDUM NO. 97

MEMORANDUM FOR	John H. Thompson Associate Director for Decennial Census
Through:	Preston J. Waite PJW Assistant to the Associate Director for Decennial Census
From:	Howard Hogan /s/ Howard Hogan Chief, Decennial Statistical Studies Division
Subject:	Overcounts for the Census 2000 Accuracy and Coverage Evaluation Survey
Contact Person:	Rick Griffin, Decennial Statistical Studies Division, Room 2500, Bldg. 2, (301-457-4227)

I. Background

Census 2000 Decision Memorandum No. 90, Subject: Overcounts in Census 2000 Dress Rehearsal, presents a decision for dealing with poststrata with estimated overcounts. A decision was made for the Dress Rehearsal to stop selecting person records for subtraction when all imputed person records in a group had been used (See Decision Memorandum No. 90 for more details). This decision will be changed for

Census 2000 as explained in this decision memorandum

II. Census 2000 Accuracy and Coverage Evaluation

For Census 2000 there will be no sampling for Nonresponse Follow-up or Undeliverable as Addressed Vacant units. Thus the proportion of the final count that is imputed persons will be much lower than for the Dress Rehearsal. To create an internal adjusted file for the 1990 Post Enumeration Survey, records for all persons (persons enumerated as well as persons imputed) in all poststrata were eligible for inclusion in the special coverage correction category. Not allowing records for enumerated persons in the coverage correction category would have resulted in an internal adjusted file with counts substantially different from the Dual System Estimates in poststrata with estimated overcounts.

If any overcounts are estimated for a particular poststratum for the Census 2000 Accuracy and Coverage Evaluation Survey (A.C.E.), the census counts for this particular group must be corrected to reflect the estimated overcount. The methodology for the A.C.E. survey will acçomplish this by creating statistical records based on both enumerated and imputed data within the poststratum. These records will then be assigned a weight of -1 and included in the census data files in a special coverage correction category. This is in addition to the records that include the reports on enumerated and imputed individuals. When the census data are tabulated, the statistical records with the negative weights will be added to the census counts to

incorporate the estimated overcount into the final results. Note that under this procedure no reported data for any individual will be removed from the Census 2000 data files.

I concur with the decision to allow all persons, enumerated and imputed, to be eligible for replication in the special coverage correction category with a weight of -1 for the Census 2000 A.C.E. Survey.

/s/ John H. Thompson — FEB 08 2000
John H. Thompson — Date
Associate Director
for Decennial Census

Supreme Court, U.S.
FILED
DEC 27 2000
CLERK

No. 00-862

In the Supreme Court of the United States

COMMONWEALTH OF VIRGINIA, APPELLANT

v.

JANET RENO, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

SETH P. WAXMAN
Solicitor General
Counsel of Record

BILL LANN LEE
Assistant Attorney General

BARBARA D. UNDERWOOD
Deputy Solicitor General

JAMES FELDMAN
Assistant to the Solicitor General

MARK L. GROSS
LISA WILSON EDWARDS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether appellant's request for a declaratory judgment that Chapter 884 of the 2000 Va. Acts of Assembly is not subject to the preclearance requirement of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, is ripe for judicial determination at this time.

2. Whether appellant's request for a declaratory judgment that Chapter 884 of the 2000 Va. Acts of Assembly does not have a retrogressive purpose and effect is ripe for judicial determination at this time.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	10
Conclusion	25

TABLE OF AUTHORITIES

Cases:

Abbott Labs. v. *Gardner*, 387 U.S. 136 (1967)	11, 12, 17
Allen v. *State Bd. of Elections*, 393 U.S. 544 (1969)	13
Ashwander v. *TVA*, 297 U.S. 288 (1936)	20
Beer v. *United States*, 425 U.S. 130 (1976)	22, 23
Boehner v. *Anderson*, 30 F.3d 156 (D.C. Cir. 1994)	14
Burns v. *Richardson*, 384 U.S. 73 (1966)	21
Consolidated Rail Corp. v. *United States*, 896 F.2d 574 (D.C. Cir. 1990)	12
Department of Commerce v. *United States House of Representatives*, 525 U.S. 316 (1999)	3, 4, 19-20
Gardner v. *Toilet Goods Ass'n*, 387 U.S. 167 (1967)	18
Jean v. *Nelson*, 472 U.S. 846 (1985)	20
Lewis v. *Continental Bank Corp.*, 494 U.S. 472 (1990)	11
Longshoremen v. *Boyd*, 347 U.S. 222 (1954)	17
National Collegiate Athletic Ass'n v. *Smith*, 525 U.S. 459 (1999)	21
Presley v. *Etowah County Comm'n*, 502 U.S. 491 (1992)	13
Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974)	11
Reno v. *Catholic Soc. Servs., Inc.*, 509 U.S. 43 (1993)	12

Cases—Continued: Page

Specter Motor Serv. v. *McLaughlin*, 323 U.S. 101 (1944) 21
Texas v. *United States*, 523 U.S. 296 (1998) 16, 17, 18, 19
Thomas v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985) 16
Toilet Goods Ass'n v. *Gardner*, 387 U.S. 158 (1967) 19, 22
United States v. *Bass*, 404 U.S. 336 (1971) 21
Wisconsin v. *New York*, 517 U.S. 1 (1996) 16

Constitution, statutes and regulations:

U.S. Const.:
Art. I, § 2, Cl. 3 2
Art. III 12
Act of Nov. 26, 1997, Pub. L. No. 105-119, Tit. II, § 209(j), 111 Stat. 2483 4
Census Act, 13 U.S.C. 1 *et seq.*:
13 U.S.C. 141(b) 2, 3, 4
13 U.S.C. 141(c) ..... *passim*
13 U.S.C. 195 ..... 3, 16
Voting Rights Act of 1965:
Section 4, 42 U.S.C. 1973b 2
Section 5, 42 U.S.C. 1973c ..... *passim*
2000 Va. Acts:
ch. 884 ..... *passim*
ch. 886 7
ch. 908 ..... 7, 9
1991 Va. Acts ch. 1 17
Va. Code Ann. (Michie 2000):
Section 24.2-301.1 ..... 6, 13
Section 24.2-304.1 6
Section 24.2-304.1(C) 13
Section 24.2-309.1 ..... 7, 8
15 C.F.R.:
Section 101.1 5
Section 101.1(a)(2) 6

Statutes and regulations—Continued: Page

Section 101.1(a)(5) 6, 15
Section 101.2 5
28 C.F.R. Pt. 51 App. 2

Miscellaneous:

65 Fed. Reg. (2000):
p. 59,713 5
p. 59,714 6
p. 59,715 ..... 6, 15
Statement of Kenneth Prewitt, Director, U.S. Bureau of the Census, Before the Subcommittee on the Census, Committee on Government Reform, U.S. House of Representatives (May 19, 2000) 5
United States Dep't of Commerce, *United States Census 2000, Accuracy and Coverage Evaluation, Statement on the Feasibility of Using Statistical Methods to Improve the Accuracy of Census 2000* (June 2000) 4, 5
United States Dep't of Commerce, *United States Census 2000, Updated Summary: Census 2000 Operational Plan* (Feb. 1999) 4
United States Dep't of Commerce, Bureau of the Census, *Report to Congress The Plan for Census 2000* (1997) 3

In the Supreme Court of the United States

No. 00-862

COMMONWEALTH OF VIRGINIA, APPELLANT

v.

JANET RENO, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

Pursuant to Rule 18.6 of the Rules of this Court, the United States respectfully moves that the judgment of the district court be affirmed.

OPINIONS BELOW

The memorandum opinion of the district court (J.S. App. 1) is reported at 117 F. Supp. 2d 46.

JURISDICTION

The judgment of the district court was entered on October 17, 2000 (J.S. App. 18). The notice of appeal was filed on October 20, 2000 (J.S. App. 19), and an amended notice of appeal was filed on November 1, 2000 (J.S. App. 24). The jurisdictional statement was filed on November 27, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

STATEMENT

1. Virginia is a jurisdiction covered under Section 4 of the Voting Rights Act of 1965, 42 U.S.C. 1973b. See 28 C.F.R. Pt. 51 App. Thus, it cannot implement a change in any "standard, practice, or procedure with respect to voting," 42 U.S.C. 1973c, unless it obtains "preclearance" of the new practice. It can obtain preclearance by obtaining a determination either from the Department of Justice or from the United States District Court for the District of Columbia that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or [on account of membership in a language minority group]." 42 U.S.C. 1973c.

2. The United States Constitution requires a decennial census of the population. U.S. Const. Art. I, § 2, Cl. 3. Data from the census are used to calculate state population totals for congressional reapportionment. *Ibid.* Under Section 141(b) of the Census Act, the Secretary of Commerce must report state population totals from the 2000 census to the President within nine months of the census date, *i.e.*, by January 1, 2001. 13 U.S.C. 141(b). The population data provided to the President pursuant to Section 141(b) are "for the apportionment of Representatives in Congress among the several States." 13 U.S.C. 141(b). The Census Act also requires the Census Bureau to report census data for very small geographical areas ("census blocks") "to the Governor of the State involved and to the officers or public bodies having responsibility for legislative apportionment or districting" of each State by April 1, 2001. 13 U.S.C. 141(c). The Census Bureau's decennial data are also used for other important purposes, such as allocation of funds by federal and state agencies. The

Census Act provides that the Secretary of Commerce "shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions" of the Act, except for "purposes of apportionment of Representatives in Congress among the several states." 13 U.S.C. 195.

Since 1940, the Census Bureau has documented a population undercount in the decennial census. *Department of Commerce* v. *United States House of Representatives*, 525 U.S. 316, 322 (1999). The undercount "has been measured in one of two ways," by comparing the unadjusted figures both with an "independent estimate of the population using birth, death, immigration, and emigration records," and with a "large sample survey * * * that is conducted in conjunction with the decennial census." *Id.* at 322. Those measurements indicate that "[s]ome identifiable groups—including certain minorities, children, and renters—have historically had substantially higher undercount rates than the population as a whole." *Id.* at 322-323; see also J.S. App. 4; United States Dep't of Commerce, Bureau of the Census, *Report to Congress The Plan for Census 2000*, at 2-4 (1997) *(Plan for Census 2000)*. In 1997, the Census Bureau reported to Congress that it would study ways to improve the accuracy of the census, including the use of sampling and other statistical correctional methods. *Plan for Census 2000*, at 6. The Census Bureau informed Congress of its plans to incorporate statistical sampling into Census 2000, and to produce one set of census figures to be used for all purposes, including apportionment under 13 U.S.C. 141(b) and redistricting under 13 U.S.C. 141(c). *Plan for Census 2000*, at 23, 32. After receiving that Report, Congress enacted legislation with respect to census data adjustment, requiring that any release of statisti-

cally adjusted data on the 2000 census be accompanied by a companion set of block-level population data for which statistical methods were not employed. Act of Nov. 26, 1997, Pub. L. No. 105-119, Tit. II, § 209(j), 111 Stat. 2483. Litigation followed challenging the use of statistical sampling to determine the population for congressional reapportionment.

In *Department of Commerce*, this Court held that Section 141(b) of the Census Act prohibits the use of statistical sampling in calculating the population for congressional apportionment purposes. 525 U.S. at 343. The decision in *Department of Commerce* did not address the use of statistically adjusted data reported to the States for purposes of state and local redistricting under Section 141(c) of the Act. See pp. 19-20, *infra*. After this Court's decision in *Department of Commerce*, the Census Bureau released an updated summary of its development of two operational plans for the 2000 census: one for providing unadjusted data for purposes of congressional apportionment, and a second for providing statistically adjusted data for all other purposes. See United States Dep't of Commerce, *United States Census 2000, Updated Summary: Census 2000 Operational Plan* (Feb. 1999).

In June 2000, the Census Bureau issued a statement on the feasibility of using statistics to improve the accuracy of the 2000 census. See United States Dep't of Commerce, *United States Census 2000, Accuracy and Coverage Evaluation, Statement on the Feasibility of Using Statistical Methods to Improve the Accuracy of Census 2000* (June 2000) (*Statement on Feasibility*). The Census Bureau stated that as part of the operations for Census 2000, it will conduct an Accuracy and Coverage Evaluation (A.C.E.), which is designed to improve census accuracy by increasing overall coverage

and reducing the differential undercount. The result of the A.C.E. would be to produce statistically corrected data. *Statement on Feasibility* 1-2, 4-7, 9-10. The A.C.E would also correct for "the small overcount that occurs when erroneous enumerations are included in the census." *Id.* at 2. The Census Bureau stated, however, that it would not release adjusted data until "it has brought its technical judgment to bear in assessing the available data to verify that its expectations have been met." *Id.* at 52. The Bureau observed that "all major census operations are vulnerable to unanticipated difficulties" that "could also affect the A.C.E.," in which case the Bureau would delay release of adjusted counts and take steps to "conduct and complete (or repeat, as necessary) all planned operations necessary to ensure that an accurate A.C.E. had taken place before releasing the statistically corrected data." *Ibid.* The Director of the Census Bureau testified in May 2000 that while the Bureau expects the corrected census figures using A.C.E. "will be the more accurate numbers," it will not use the adjusted numbers if it "does not have confidence in the A.C.E. results." Statement of Kenneth Prewitt, Director, U.S. Bureau of the Census, Before the Subcommittee on the Census, Committee on Government Reform, U.S. House of Representatives (May 19, 2000), 2000 WL 668026.

The Department of Commerce recently promulgated a final rule that sets out the procedures for the release of statistically adjusted population data for use by States and localities pursuant to 13 U.S.C. 141(c). 15 C.F.R. 101.1, 101.2 (effective Nov. 6, 2000), published in 65 Fed. Reg. 59,713 (2000). In its discussion of the final rule, the Department explained that while it "expects the statistically corrected data to be more accurate for non-apportionment uses," "no decision has been

reached" on issuing those data. *Id.* at 59,714. The Department stated that if the statistical adjustment "would not improve the accuracy of the initial census counts, then the data without statistical correction would be released" to the States by the April 1, 2000 deadline. *Ibid.* The rule delegates to the Director of the Bureau of the Census the authority to make the final determination regarding the method to be used in calculating the tabulation of populations reported to States and localities pursuant to 13 U.S.C. 141(c). 15 C.F.R. 101.1(a)(2); 65 Fed. Reg. at 59,715. The rule does not, however, diminish the Secretary's authority to revoke or amend that delegation. 15 C.F.R. 101.1(a)(5) ("Nothing in this section diminishes the authority of the Secretary of Commerce to revoke or amend this delegation of authority or relieves the Secretary of Commerce of responsibility for any decision made by the Director of the Census pursuant to this delegation."); 65 Fed. Reg. at 59,715 ("[T]he current or any future Secretary of Commerce could revoke that delegation by issuing another final rule doing so.").

3. Earlier this year, the Virginia General Assembly enacted new legislation, 2000 Va. Acts ch. 884 (Chapter 884), which requires the use of "actual, enumerated" —*i.e.*, unadjusted—population counts provided by the Census Bureau for the purpose of redrawing boundaries of congressional, state Senate, and state House of Delegates districts. Va. Code Ann. § 24.2-301.1 (Michie 2000). Chapter 884 also directs governing bodies of counties, cities, and towns to use unadjusted data in drawing districts. *Id.* § 24.2-304.1.[1] The General

[1] The new law also reduces the time during which counties, cities, and towns are prohibited from altering precincts or chang-

Assembly also enacted legislation that authorizes the State Board of Elections to reschedule the state-wide primary election of June 12, 2001, if necessary. 2000 Va. Acts ch. 886.[2] Chapter 886 relaxes candidate qualifying and other deadlines for state and county elections if redistricting has not been completed and preclearance under Section 5 has not been obtained in time to hold the primary at the regularly scheduled time. Chapter 886 authorizes the postponement of Virginia's 2001 primary election to a date as late as September 11, 2001, and permits a decision as late as May 12, 2001, as to whether a postponement is necessary. These provisions extend to all primary elections for state legislative office and for seats on county governing bodies and elected school boards.[3]

4. On May 18, 2000, Virginia filed a complaint under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, seeking a declaratory judgment that Chapter 884 should be precleared under Section 5 or, in the alternative, was not subject to Section 5. Specifically, Virginia alleged in Count I that Chapter 884 does not require Section 5 preclearance because (1) the Census Act and the United States Constitution require the use of unadjusted figures, and (2) Virginia's continued use

---

ing the boundaries of any precincts. Under the old law, changes were prohibited from Sept. 1, 1998 to June 1, 2001. The amended provision, Va. Code Ann. § 24.2-309.1 (Michie 2000), permits localities to redraw precincts beginning May 15, 2001.

[2] On the same day as it enacted Chapter 886, the legislature also enacted another, virtually identical statute, 2000 Va. Acts ch. 908. For convenience, we refer herein to Chapter 886.

[3] Virginia submitted Chapters 886 and 908, see note 2, *supra*, to the Department of Justice for administrative preclearance under Section 5. On August 3, 2000, the Department of Justice precleared Chapters 886 and 908.

of unadjusted figures does not constitute a change in redistricting practices within the meaning of Section 5. Count II of the complaint alleged that the Department of Justice planned to use adjusted figures classified by the Department of Commerce as "P.L. No. 94-171 data"— *i.e.*, released by the Department under 13 U.S.C. 141(c) — in preclearance evaluations and that such use would violate the Census Act and is unconstitutional. Counts III and IV alleged that, even if preclearance is required, Chapter 884 was not enacted with a retrogressive purpose, nor does it have a retrogressive effect, within the meaning of Section 5 of the Voting Rights Act. Count V alleged that Va. Code Ann. § 24.2-309.1 (Michie 2000), which extends the time for localities to draw voting precincts, does not have a retrogressive purpose or effect within the meaning of Section 5.

A three-judge court was convened, pursuant to 42 U.S.C. 1973c, and numerous parties were granted intervention. The United States moved to dismiss Counts I, III and IV without prejudice or to stay the proceedings, on the ground that Virginia's claims were not yet ripe. The United States argued that Virginia's claims would not be ripe unless and until the Census Bureau releases adjusted census data, since if the Bureau should choose to release only unadjusted data, the Commonwealth's claims would be hypothetical. The United States moved to dismiss Count II on ripeness grounds and for failure to state a claim. The district court heard argument on September 21, 2000.

5. On October 17, 2000, the district court dismissed Counts I, II, III and IV on ripeness grounds. The district court granted preclearance of Va. Code Ann. § 24.2-309.1 (Michie 2000), set out in Count V. J.S. App. 1-17.

The court first addressed Virginia's claims for a declaration that Chapter 884 does not have a retrogressive purpose or effect (Counts III and IV). The court determined that assuming that Chapter 884 is "subject to preclearance under Section 5," the district court could not assess the "retrogressive effect" of the statute because "[t]o evaluate Virginia's legislation under Section 5, the court would have to decide if the difference between actual and adjusted figures is of significance, and whether redistricting using actual figures could be considered a 'retrogression in the position of racial minorities with respect to [voting].'" J.S. App. 11. The district court stated that "[t]his analysis need only be conducted if and when the Census Bureau releases adjusted figures." *Id.* at 11-12. The district court explained that "[i]f the Census Bureau does not release adjusted data, Chapter 884 will have no practical effect, and this court would not need to grapple with the issue of whether to define retrogression in terms of adjusted figures." *Id.* at 12. The district court observed that, while the Census Bureau "has announced that it plans to release adjusted figures, it has not yet committed to doing so," and that the Census Bureau will "make its final decision on whether to release adjusted data after" it evaluates their quality and accuracy. *Ibid.*

The court also found that Virginia "has not satisfied the 'hardship' prong of the * * * ripeness inquiry." J.S. App. 12. The court noted that the newly enacted Chapter 886 "allows the State Board of Elections to reschedule primaries" if necessary, *id.* at 13, and that "the Census Bureau and the Department of

Justice have announced their intention to expedite proceedings for states that must meet redistricting deadlines," *id.* at 14.

With respect to Virginia's request for a declaration that Chapter 884 is not subject to Section 5 (Count I), the court similarly held that "ripeness considerations preclude [the district court's] review." J.S. App. 15. The court explained that, although that claim "presents questions of law, the relevance of these claims—and the ultimate need for their adjudication—depends entirely on the Census Bureau's release of adjusted population data." *Ibid.* The court noted that "if the Census Bureau releases only actual figures, there may well be no dispute between the parties regarding Chapter 884, and any ruling by the court now on the issues raised by count I would become an advisory opinion prohibited under Article III." *Ibid.* The court held that, for the same reasons, Virginia's claim that the Department of Justice may not use adjusted population figures in evaluating Section 5 submissions is not ripe. *Id.* at 16.

4. Virginia noticed an appeal of the dismissal of Counts I, III and IV on October 24, 2000. The Commonwealth did not appeal the dismissal of Count II. See J.S. 5 n.4. Virginia filed its jurisdictional statement on November 27, 2000.

ARGUMENT

Virginia seeks a declaratory judgment that its new state law requiring the use of unadjusted census data for purposes of state and local redistricting is not retrogressive in purpose or effect or is not subject to preclearance under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. The district court correctly concluded that Virginia's request for a declaratory judgment is not ripe for judicial review, because

resolution of Virginia's claims is contingent on the future release of statistically adjusted population data by the Census Bureau, an event that may not occur. The Director of the Census Bureau has not finally determined whether to release statistically adjusted population data for state and local redistricting under 13 U.S.C. 141(c), and his authority to release such data may in any event be revoked at any time by the Secretary of Commerce. Moreover, Virginia's claims are premised at least in part on the resolution of certain constitutional issues and on the adoption of interpretations of the Census Act that would severely restrict the States as they attempt to draw new congressional, state, and local districts. It is particularly inappropriate to resolve such questions in the hypothetical and contingent posture presented in this case. Because the district court's ruling on ripeness is correct, the court's judgment should be affirmed.

1. "Article III denies federal courts the power to decide questions that cannot affect the rights of litigants in the case before them, and confines them to resolving real and substantial controversies admitting of specific relief through a decree of a conclusive character." *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990) (internal quotations and citation omitted). This Court has instructed that ripeness is "peculiarly a question of timing," *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 140 (1974), designed to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 148 (1967). The role of federal courts is not to issue advisory opinions or declare rights in hypothetical cases, but to adjudicate live cases or controversies consistent with the powers granted the judiciary in

Article III of the Constitution. The ripeness doctrine is "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno* v. *Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n. 18 (1993).

In evaluating the prudential ripeness of a claim, a court must decide "the fitness of the issues for judicial decision" and the "hardship to the parties of withholding court consideration." *Abbott Labs.*, 387 U.S. at 149. In determining whether a claim is "fit for judicial decision," courts look at whether the issue is essentially "legal" and sufficiently "final." *Id.* at 149; see also *Consolidated Rail Corp.* v. *United States*, 896 F.2d 574, 577 (D.C. Cir. 1990). To satisfy the "hardship prong," courts must conclude that "the impact of the regulation * * * is sufficiently direct and immediate as to render the issue appropriate for judicial review." *Abbott Labs*, 387 U.S. at 152.

2. The district court correctly held (J.S. App. 14-16) that Virginia's claim in Count I that Chapter 884 is not subject to preclearance under Section 5—*i.e.*, that it may be enforced without obtaining preclearance from the United States Department of Justice or the District Court for the District of Columbia—is not ripe for review.

a. Before the enactment of Chapter 884, Virginia law did not impose any limitations on the ability of state and local officials to use whatever census figures they chose in drawing districts. Under Chapter 884, however, state law imposes a strict requirement on state and local authorities in drawing districts. Chapter 884 requires that the State and its localities use only unadjusted census data "[f]or the purposes of redrawing the boundaries of the congressional, state Senate, and House of Delegates districts," Va. Code

Ann. § 24.2-301.1 (Michie 2000), and "[f]or the purposes of reapportioning representation" in "the governing body of a county, city, or town," *Id.* § 24.2-304.1(C) (Michie 2000).

"Congress intended [in Section 5 of the Voting Rights Act] to reach any state enactment which altered the election law of a covered State in even a minor way." *Presley* v. *Etowah County Comm'n*, 502 U.S. 491, 501 (1992) (quoting *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 566 (1969)). It is our position that Chapter 884 altered Virginia law and therefore requires preclearance, because it substantially limits the discretion previously vested in state and local authorities regarding which figures they may use in drawing districts. In addition, there may be factual issues present regarding which figures the State and its localities have used in redistricting prior to the enactment of Chapter 884 and, accordingly, the extent to which Chapter 884 changes state law. Cf. J.S. 17 n.13; J.S. App. 53-54.[4] Virginia's position, by contrast, is that Chapter 884 does not need preclearance, because state and local officials allegedly have always used unadjusted census figures.[5]

---

[4] We sought discovery on these issues in the district court. Because the court dismissed the case (without prejudice) on ripeness grounds, there was no opportunity for discovery.

[5] Virginia characterizes (J.S. 16) Chapter 884 as requiring use of the same census data that state and local redistricting officials have used in the past. In addition to taking an incorrect view of the nature of the change made by Chapter 884, that argument is logically flawed. The analogous data from the 1980 and 1990 Censuses were (a) unadjusted by means of sampling and (b) deemed appropriate by the Secretary of Commerce under 13 U.S.C. 141(c) for transmittal to the States. The unadjusted data required to be used by Chapter 884 would not satisfy both conditions if the data

b. The district court correctly apprehended that the question whether Chapter 884 requires preclearance "presents questions of law," J.S. App. 15, although as we note above it may present questions of fact as well. See p. 10, *supra*. But even the questions of law that are presented by Count I are presented in a uniquely abstract setting. As the district court noted, "the ultimate need for the[] adjudication" of those claims "depends entirely on the Census Bureau's release of adjusted population data." J.S. App. 15. If the Census Bureau releases only unadjusted data, "there may well be no dispute between the parties." *Ibid.* That is because the question whether Chapter 884 should be precleared would have no practical effect; in that event, Chapter 884 would merely dictate that Virginia state and local authorities must use the same, unadjusted data that are the only data released by the Census Bureau and the only data the state and local authorities would use in the absence of Chapter 884. Accordingly, although there may still be an abstract controversy regarding whether Chapter 884 limits discretion previously vested in state officials and whether such a limitation on discretion would constitute a voting change in the circumstances present here, there would be no genuine disagreement between the parties regarding any step that Virginia might take in its redistricting. Cf. *Boehner* v. *Anderson*, 30 F.3d 156, 163 (D.C. Cir. 1994) (dismissing, on ripeness grounds, a challenge to a congressional pay raise statute because no quadrennial salary adjustment had been proposed or enacted).

---

ultimately released under Section 141(c) are adjusted rather than unadjusted.

c. Virginia rests its argument that its claim is ripe on the proposition that "release of the adjusted data is *inevitable*." J.S. 10. See also, *e.g.*, J.S. 3 (Department of Commerce "has now virtually ensured that population data adjusted by sampling *will be* released"), 4 ("imminent release" of the adjusted data), 6-7 ("possibility that the Bureau will not release the adjusted Redistricting Data * * * is so remote and speculative that there is simply no 'if and when' about it"). The district court, however, correctly found that the Census Bureau "has not yet committed" to releasing the adjusted data. J.S. App. 12; see also *id.* at 4 ("[T]he Census Bureau announced that it has not yet determined whether to release the adjusted data for purposes of state redistricting under § 141(c)."). Instead, the Bureau has stated that, although it "currently expects that the corrected numbers using [sampling] will be the more accurate numbers, it will not release adjusted data if it does not have confidence in the [sampled] results." *Id.* at 5 (internal quotation marks omitted). In short, any commitment by the Census Bureau to release adjusted data would come only after the Bureau "evaluates the quality and accuracy of the A.C.E. process." *Id.* at 12. Accordingly, release of the adjusted data remains a contingent future possibility.

Moreover, the regulations currently in force carefully acknowledge the Secretary of Commerce's authority to revoke the delegation to the Census Bureau and to decide himself whether to release adjusted data, and the Secretary's likely course of action in this regard cannot at present be known. The regulations explicitly state that they do not "diminish[] the authority of the Secretary of Commerce to revoke or amend this delegation." 15 C.F.R. 101.1(a)(5); see also 65 Fed. Reg. at 59,715 ("[T]he current, or any future Secretary of Commerce

could revoke th[e] delegation by issuing another final rule doing so."). See also 13 U.S.C. 195 (granting to the Secretary the authority "*if he considers it feasible*, [to] authorize the use of the statistical method known as 'sampling' in carrying out the provisions of [the Census Act]") (emphasis added). This year, the data for Virginia are likely to be available sometime in March 2001.[6] In 1991, the Secretary himself made a determination, on the basis of an extensive analysis, not to release adjusted data. See *Wisconsin* v. *New York*, 517 U.S. 1, 10-12 (1996). It cannot currently be known whether the Secretary of Commerce will revoke the Census Bureau's authority and again decide not to release the adjusted data, as in 1991.

For the reasons given above, Virginia's claim is therefore not ripe for adjudication because it depends upon "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1985). As the Court explained in *Texas* v. *United States*, 523 U.S. 296, 301 (1998), in which Texas similarly sought a declaratory judgment that a newly enacted statute did not require preclearance under Section 5, the claim here requires the district court "to hold that under no circumstances can the [operation of the state law for which preclearance is sought] constitute a change affecting voting." But, as in *Texas*, a

---

[6] By law, the data to be used for redistricting must be released by April 1, 2001. 13 U.S.C. 141(c) ("within one year after the decennial census date"). The Census Bureau has stated that it "cannot begin to deliver population data earlier than March 2001." J.S. App. 51. Thus, although the Bureau has announced that it will "giv[e] priority to states that need to meet early deadlines," *id.* at 14, the figures for Virginia are not likely to be ready until sometime in March 2001.

court should lack "sufficient confidence in [its] imagination to affirm such a negative." *Ibid.* "Here, as is often true, '[d]etermination of the scope . . . of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function.'" *Ibid.* (quoting *Longshoremen* v. *Boyd*, 347 U.S. 222, 224 (1954)). Because Virginia's claim that Section 884 makes no "change affecting voting" depends on a future contingent event that may not occur, the district court correctly held that it presents only an "'abstract disagreement' that may never materialize," J.S. App. 15 (quoting *Abbott Labs.*, 387 U.S. at 148), and it is not ripe for adjudication.

d. The district court also correctly concluded that "Virginia has not satisfied the 'hardship' prong of the *Abbott Laboratories* ripeness inquiry." J.S. App. 12. The district court noted that on the day the State enacted Chapter 884, it also enacted legislation that permits its primaries to be postponed until as late as September 11, 2001, if it is unable to draw new districts in time for the scheduled June 12, 2001, primaries. *Id.* at 13. There is precedent for taking that step, since ten years ago, after the 1990 census, the Virginia legislature moved the date of the primary from June 11, 1991 to September 10, 1991. 1991 Va. Acts ch. 1. The district court also noted that the Census Bureau and the Department of Justice had committed themselves to expedited administrative action "for Virginia and other states holding elections in 2001." J.S. App. 14. Those measures are likely to expedite the process sufficiently to permit Virginia's elections to be held as scheduled—even if the Census Bureau in the end releases both adjusted and unadjusted data. At worst,

the date of the primary election would have to be postponed, as it was in 1991.

In addition, as the district court noted, "there is nothing to prevent Virginia from redistricting on the basis of actual figures, as it claims it has consistently done in the past." J.S. App. 13. In *Texas* v. *United States*, the State made a similar claim that it would suffer hardship in the absence of a Section 5 declaratory judgment. This Court noted, with respect to the State's claim of hardship, that

> [i]f Texas is confident that the [operation of the statute] does not constitute a change affecting voting, it should simply go ahead with [administering the statute]. Should the Attorney General or a private individual bring suit (and if the matter is as clear, even at this distance, as Texas thinks it is), we have no reason to doubt that a district court will deny a preliminary injunction.

523 U.S. at 301-302. The same conclusion follows here.

Virginia asserts (J.S. 12-13) that this Court's decision in *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167 (1967), supports its contention that this case is ripe. In *Gardner* v. *Toilet Goods Ass'n*, plaintiff manufacturers claimed that certain regulations were invalid. The Court explained that a declaratory judgment action was available to resolve that claim, because otherwise the manufacturers would have to "refuse to comply [with the regulations], *continue to distribute products that they believe do not fall within the purview of the Act*, and test the regulations by defending against government criminal, seizure, or injunctive suits against them." *Id.* at 172 (emphasis added). Thus, the "impact of the regulation could be said to be felt immediately by those subject to it in conducting their day-to-day

affairs." *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 164 (1967). Here, by contrast, Virginia is not currently engaging in any course of conduct that is threatened by Section 5. To the contrary, the issue in this case could have an effect on Virginia's enforcement of Chapter 884 at the earliest in the event of a future contingency (the release of adjusted data by the Census Bureau) that will not occur before March 2001 and may not occur at all. As this Court held in *Texas*, Virginia's claim of present injury is "an abstraction no graver than the 'threat to personal freedom' that exists whenever an agency regulation is promulgated, which we hold inadequate to support suit unless the person's primary conduct is affected." 523 U.S. at 302.

e. Finally, the nature of Virginia's claims also supports the district court's finding that this case is not ripe. Virginia argues extensively (J.S. 18-29) that "Chapter 884 is not covered by Section 5 because the use of enumerated and unadjusted population counts in redistricting is mandated by the Census Act and the Constitution of the United States." J.S. 18. Virginia's claim raises constitutional questions and requires the interpretation of a federal statute in a way that threatens to alter the federal-state balance. The district court's resolution of this case properly postpones the need to resolve those issues in the highly contingent posture in which they are currently presented.

This Court held in *Department of Commerce* "that the Census Act prohibits the proposed uses of statistical sampling in calculating the population for purposes of apportionment." 525 U.S. at 343. The Court stated, however, that the claims before it challenged the "planned use of statistical sampling to apportion Representatives among the States." *Id.* at 327; see also *id.* at 328 (the "proposed use of sampling to determine the popu-

lation for purposes of apportioning Members of the House of Representatives among the several States"). The Court had no occasion to rule on any question regarding the drawing of congressional districts within each State, and it certainly did not rule on any question regarding the primary subject matter of Chapter 884 at issue here—the drawing of state legislative districts.[7]

Virginia's contentions therefore require this Court to reach statutory and constitutional issues that it did not address in *Department of Commerce* and whose resolution should, if possible, be avoided until presented in a more concrete context. See *Jean* v. *Nelson*, 472 U.S. 846, 854 (1985); *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). With respect to the argument that the Census Act requires States to use unadjusted data, Virginia does not specify where in the text of the Act such a requirement can be found. But even if there were language in the Act that suggested that Congress intended to require the States to use unadjusted data in state legislative redistricting, there would remain questions regarding Congress's constitutional authority to achieve that result. In addition, interpreting the Census Act as Virginia suggests should not be lightly undertaken, since Virginia's argument requires the Court to restrict state action in this area on the basis of a tenuous inference of con-

---

[7] Although Chapter 884 also may have effects on the drawing of congressional districts, Virginia has premised its claim of hardship solely on the need to draw state legislative districts in time for the November 2001 elections. See J.S. 13-15. Since congressional elections will not be held until November 2002, Virginia's ability to draw congressional districts in a timely fashion would not be affected if adjudication of its claims regarding the preclearance of Chapter 884 were delayed until the Census Bureau releases its data in March 2001.

gressional intent. Cf. *United States* v. *Bass*, 404 U.S. 336, 349 (1971). Similarly, Virginia's constitutional argument would require this Court to hold that the federal Constitution severely limits the ability of the States to determine the type of data that they can use in designing state legislative districts—a holding that would also significantly affect the federal-state balance.[8] See *Burns* v. *Richardson*, 384 U.S. 73, 91-92 (1966). This Court ought not pass on the important constitutional and statutory questions posed by Virginia's complaint "unless such adjudication is unavoidable." *Specter Motor Serv.* v. *McLaughlin*, 323 U.S. 101, 105 (1944). None of Virginia's statutory or constitutional contentions should be accepted in an abstract and contingent setting like that provided by this case.[9]

---

[8] While Virginia welcomes that restriction, not every State would necessarily share that view. Indeed, a number of localities —including the cities of Richmond, Virginia, Los Angeles and San Francisco, California, Denver, Colorado, San Antonio, Texas, Dearborn, Michigan, and Dade County, Florida, intervened in this case and opposed Virginia's arguments about the requirements imposed by the Census Act and the Constitution. See J.S. iii.

[9] The district court did not reach the merits of any of Virginia's claims and there was no development of a factual record. As a general matter, this Court "do[es] not decide in the first instance issues not decided below." *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999). Accordingly, Virginia's request (J.S. 15-29) that this Court resolve its statutory and constitutional claims before those claims have been considered by any other court should in any event be rejected. In addition, the Court should not address those claims in the absence of a factual record. Such a record would presumably include the bases given by the Bureau of the Census—the agency that has been charged by Congress with the responsibility for conducting the census and reporting the results—for any decision that is made to release adjusted data, and it would also include the development of a factual record in the

3. The district court also correctly held (J.S. App. 10-14) that Virginia's claim that Chapter 884 does not have a retrogressive purpose and effect (Counts III and IV) is not yet ripe for review.

With respect to the "effect" prong of Section 5, Virginia may obtain preclearance only if it carries its burden of showing that the effect of Chapter 884 is not retrogressive—*i.e.*, of showing that application of the statute will not cause a decline in "the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer* v. *United States*, 425 U.S. 130, 141 (1976). Insofar as Virginia's claim here is that Chapter 884 has no retrogressive "effect" because it is not a voting change, we have addressed that argument above. See pp. 9-10, *supra*. The district court therefore correctly "assum[ed]" for purposes of analyzing the ripeness of Virginia's "no retrogressive effect" claim "that Chapter 884 is subject to preclearance under Section 5," and hence that Chapter 884 makes a voting change. J.S. App. 11.

Because the "effects," if any, of Chapter 884 cannot be known until the Census Bureau releases its population figures, the question whether Chapter 884 would have any retrogressive effects is not yet ripe for adjudication. As the district court explained, "[t]o evaluate Virginia's legislation under Section 5, the court would have to decide if the difference between actual and adjusted figures is of significance, and whether redistricting using actual figures could be considered a

---

and procedure[s]," 42 U.S.C. 1973c, with respect to data used in redistricting. Cf. *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 164 (1967) ("We believe that judicial appraisal * * * is likely to stand on a much surer footing in the context of a specific application of this regulation than could be the case in the framework of the generalized challenge made here.").

'retrogression in the position of racial minorities with respect to [voting].'" J.S. App. 11 (quoting *Beer*, 425 U.S. at 141). Depending on the figures released by the Census Bureau, Chapter 884 could have no effect (if, for example, the Census Bureau releases only unadjusted data or if the position of minorities in the resulting redistricting plan would not be significantly affected by the use of unadjusted, rather than adjusted, data) or it could have a substantial effect (if, for example, the Census Bureau releases both adjusted and unadjusted data, and the differences between the two data sets are such that the State's use of unadjusted data causes it to draw districts in which minorities have substantially diminished voting strength, as compared to the post-1990 redistricting).[10] There is no reason, *ab initio*, to suppose that one or the other of these possibilities, or some other outcome in between, is more likely. Accordingly, Virginia's claim for preclearance of Chapter 884 at this time is not ripe.

Because Virginia's "effect" claim is not yet ripe, there was no basis for the district court to adjudicate Virginia's claim that Chapter 884 did not have a retro-

---

[10] One way in which the choice of data could have significance would be if the minority population in a given area appeared to decline if measured by the unadjusted data but to stay constant or increase if measured by the adjusted data. In that circumstance, the use of unadjusted data could cause a State to diminish minority voting strength, while use of the adjusted data could lead to maintenance of existing minority voting strength. We do not mean to suggest by the use of this or any other example that we view it as likely that the use of unadjusted data will have this effect. To the contrary, it is possible that the choice of unadjusted data would have no measurable effect on minority voting strength. The uncertainty, however, illustrates the need to have the census data in hand when determining the effect of Chapter 884 on Virginia's redistricting choices.

gressive "purpose." Under Section 5, a jurisdiction may not enforce a voting change "unless and until" it obtains a declaratory judgment that it "does not have the purpose *and* will not have effect of denying or abridging the right to vote." 42 U.S.C. 1973c (emphasis added). A jurisdiction thus may not enforce a voting change until it shows that the change lacks both the specified purpose and the specified effect. The district court's ruling that Virginia's "effect" claim is not ripe accordingly made it impossible for the court to give Virginia the declaratory judgment it sought regarding "purpose" under Section 5.

Virginia concedes in a footnote that its purpose claim "involves a factual issue," but it argues that "there is no benefit to be gained by waiting to consider it." J.S. 12 n.9. There is also, however, no benefit to be gained by deciding that issue now, since deciding just that issue would resolve nothing in terms of whether Virginia may enforce Chapter 884. The district court correctly apprehended that any judgment as to whether Chapter 884 has a retrogressive purpose must await the ripening of Virginia's claim for a declaratory judgment that Chapter 884 may be enforced under Section 5.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

BILL LANN LEE
Assistant Attorney General

BARBARA D. UNDERWOOD
Deputy Solicitor General

JAMES FELDMAN
Assistant to the Solicitor General

MARK L. GROSS
LISA WILSON EDWARDS
Attorneys

DECEMBER 2000

Supreme Court, U.S.
FILED

DEC 29 2000

OFFICE OF THE CLERK

(3)

No. 00-862

In The

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Appellant,

v.

JANET RENO, et al.,

Appellees.

On Appeal From A Three-Judge Panel Of The United States District Court For The District Of Columbia

MOTION OF NON-FEDERAL APPELLEES TO DISMISS APPEAL OR TO AFFIRM THE JUDGMENT OF THE DISTRICT COURT

BARBARA R. ARNWINE
THOMAS J. HENDERSON
EDWARD STILL
Counsel of Record
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Ave. NW, Suite 400
Washington, DC 20005
(202) 662-8600

MARC K. TEMIN
VERNE W. VANCE, JR.
FOLEY HOAG & ELIOT LLP
One Post Office Square
Boston, MA 02109
(617) 832-1000

Counsel for Virginia State Conference of the NAACP et al.

[Additional Counsel Listed At Conclusion Of Brief]

18 pp

TABLE OF CONTENTS

ARGUMENT 1

I. Virginia's Appeal Raises No Substantial Federal Question. 2

II. The District Court Correctly Held That Virginia's Claims Are Not Ripe For Judicial Consideration At This Time 4

A. Virginia's Request for Declaratory Judgment under Section 5 of the Voting Rights Act is Not Ripe for Review, Because the Census Bureau Has Not Yet Made a Final Decision To Release Statistically Corrected Census Data. 4

B. Even If It Were Now Certain That the Census Bureau Will Release Statistically Corrected Census Data, Virginia's Claim Would Not Be Ripe. 7

C. Virginia's Failure To Appeal the Dismissal of Count II Confirms That Its Claim Is Not Ripe. 8

III. The Merits Of Virginia's Claim Are Not Properly Before This Court 9

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Abbott Laboratories v. Gardner,
387 U.S. 136 (1967).....5

Ashwander v. TVA,
297 U.S. 288 (1936).....3

Brandon v. Holt,
469 U.S. 464 (1985).....10

City of New York v. Department of Commerce,
822 F. Supp. 906 (E.D.N.Y. 1993).....6

Department of Commerce v. U.S. House of Representatives,
526 U.S. 314 (1999).....12

Duke Power Co. v. Carolina Environmental Study Group, Inc.,
438 U.S. 59 (1978).....7

Hunt v. Cromartie,
526 U.S. 541 (1999).....11

Mitchell v. Forsyth,
472 U.S. 511 (1985).....10, 11

Nixon v. Fitzgerald,
457 U.S. 731 (1982).....10, 11

Reno v. Bossier Parish School Board,
120 S. Ct. 866 (2000).....5

Spector Motor Service v. McLaughlin,
323 U.S. 101 (1944).....12

Thomas v. Union Carbide Agricultural Products Co.,
473 U.S. 568 (1985).....5

Texas v. United States,
523 U.S. 296 (1998).....5, 6

United Public Workers of America v. Mitchell,
330 U.S. 75 (1947).....4

STATUTES

Voting Rights Act of 1965, Section 5, 42 U.S.C. § 1973c..... *passim*

2000 Va. Acts of Assembly, Ch. 884.... *passim*

MOTION OF NON-FEDERAL APPELLEES TO DISMISS APPEAL OR TO AFFIRM THE JUDGMENT OF THE DISTRICT COURT

Pursuant to Rule 18.6 of the Rules of this Court the non-federal appellees (the Virginia NAACP Intervenors, the Smith Intervenors, the Marsh Intervenors, and the City of Los Angeles *et al.* Intervenors – collectively, the "Intervenors"), who are defendant-intervenors in this case before the United States District Court for the District of Columbia, move to dismiss this appeal or, in the alternative, to affirm the judgment of the District Court dismissing without prejudice Counts I, II, III and IV of the complaint of the plaintiff-appellant, the Commonwealth of Virginia ("Virginia"). In support of this motion the Intervenors submit the following argument.

ARGUMENT

Virginia's Jurisdictional Statement sets forth, albeit in very self-serving terms, the background of this case. What is most significant to this motion, and to this appeal, is the final paragraph of Virginia's Statement of the Case, wherein Virginia notes that the District Court dismissed its claims as not ripe for judicial consideration at this time because the Census Bureau has not yet committed to releasing redistricting data that has been corrected by statistical sampling.[1] (Jurisdictional Statement ["J.S."] Appendix ["App."] 12). Given that decision below, the Intervenors respectfully submit that the only Question Presented by this appeal is the first of the four questions set

---

[1] Virginia uses the term "adjusted" to refer to this census data. The Census Bureau refers to the census data in question as "statistically corrected," rather than "statistically adjusted," to reflect the fact that "the statistically corrected data will be more accurate," (J.S. App. 64), so the term "corrected" will be used herein.

forth in Virginia's Jurisdictional Statement – the question whether the District Court erred in dismissing as unripe Virginia's request for a declaratory judgment that Chapter 884 of the 2000 Va. Acts of Assembly ("Chapter 884") (1) is not covered by Section 5 of the Voting Rights Act or (2) if covered, does not have a retrogressive purpose or effect.

I. Virginia's Appeal Raises No Substantial Federal Question.

As noted above and discussed more fully below, the only question presented by Virginia's appeal is whether the District Court correctly ruled that Virginia's request, for a declaratory judgment that Chapter 884 does not run afoul of Section 5 of the Voting Rights Act, is not ripe for judicial consideration. None of the other issues raised by Virginia, as set forth in the last three of its Questions Presented, was considered by the District Court.

An appeal that presents only the question of ripeness regarding a claim concerning a single statute of a single state patently does not raise a substantial federal question for consideration by this Court. Virginia attempts to argue a wider scope for its appeal by suggesting that Alaska, Arizona, and Kansas have enacted legislation similar to Chapter 884. It is noteworthy, however, that neither Alaska nor Arizona has as yet filed an action seeking the relief that Virginia seeks here, and Kansas is not even covered by Section 5 of the Voting Rights Act. Thus, it is only the ripeness of Virginia's claim with respect to its Chapter 884 that is at issue here. That does not raise a substantial federal question.

Virginia's appeal also does not raise a substantial federal question because, by the admission of its own counsel in oral argument before the District Court, even a favorable decision on the limited claims under Section 5 of the Voting Rights Act that are the subject of this appeal

would give Virginia only a "hollow victory." Such a victory would be "hollow" because it would still not preclude the Department of Justice from using data other than uncorrected census data in reviewing Virginia's new redistricting plan. (Hearing transcript, September 11, 2000, p. 43.)[2]

Virginia initially addressed this issue by including in Count II of its Amended Complaint a request that the Department of Justice be precluded from relying on corrected population counts in its review of redistricting plans submitted pursuant to Section 5. The District Court held that that claim, like those in Counts I, III, and IV of Virginia's Amended Complaint, was not ripe, but Virginia has not appealed the dismissal of Count II. Thus, by its own admission, it seeks on this appeal what would, at best, be a "hollow victory" that would not resolve its ultimate concern – that the Justice Department be required to use only the uncorrected census data in reviewing Virginia's redistricting plan for the preclearance it requires under the Voting Rights Act.

Thus not only is Virginia seeking an advisory opinion from this Court, but it is an advisory opinion that would constitute only a "hollow victory" for the plaintiff. This Court's jurisprudence cautions that constitutional issues should be reached only when required. *Ashwander v. TVA*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring). Further, in this lawsuit's present posture, any decision on

---

[2] Virginia will have to submit any redistricting plan for congressional or legislative districts for preclearance even if it obtains preclearance of Chapter 884. In addition to the policy change embodied in Chapter 884, a redistricting plan will contain new districts that will be a "standard, practice, or procedure with respect to voting different from that [previously] in force or effect," Voting Rights Act of 1965, Section 5, 42 U.S.C. § 1973c.

the constitutional or Census Act claims would be purely advisory, and, thereby, impermissible. *United Public Workers of America v. Mitchell*, 330 U.S. 75, 88-89 (1947). Under these circumstances, Virginia's request not only does not raise a substantial federal question but is inappropriate for adjudication by this Court, and Virginia's appeal should be dismissed.

II. The District Court Correctly Held That Virginia's Claims Are Not Ripe For Judicial Consideration At This Time.

A. Virginia's Request for Declaratory Judgment under Section 5 of the Voting Rights Act is Not Ripe for Review, Because the Census Bureau Has Not Yet Made a Final Decision To Release Statistically Corrected Census Data.

Virginia seeks preclearance under Section 5 of the Voting Rights Act of Chapter 884, which prevents Virginia and its political subdivisions from using statistically corrected census data for redistricting for state officials. Under Section 5, Virginia has the burden of proving that the submitted voting changes will not have a retrogressive racially discriminatory effect and that they were not adopted with a discriminatory intent to retrogress. As this Court has held,

> [a] covered jurisdiction . . . must make two distinct showings: first, that the proposed change 'does not have the purpose . . . of denying or abridging the right to vote on account of race or color,' and second, that the proposed change 'will not have the effect of denying or abridging the right to vote on account of race or color.'

Reno v. Bossier Parish School Bd., 120 S. Ct. 866, 871-872 (2000) (citations omitted).

Consideration of these issues, however, may be undertaken only if the claims are ripe for review. *Texas v. United States*, 523 U.S. 296 (1998). Whether or not Virginia's ban on the use of statistically corrected census data will have a retrogressive effect cannot be determined until the time, if ever, when the corrected census data are released. Therefore, Virginia's preclearance claims are not yet ripe for review.

This Court has held that in a Section 5 declaratory judgment action, "[a] claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 581 (1985)). Moreover, this Court has reasoned that in considering whether an issue is ripe for judicial consideration, it must "'evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Texas*, 523 U.S. at 301 (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967)).

Virginia's claim that Chapter 884 will not have a retrogressive effect is contingent ultimately upon the type or types of data issued by the Census Bureau and how significantly those data reflect an undercount of the minority population of the state of Virginia. As the District Court observed, "the court would have to decide if the difference between actual and adjusted figures is of significance, and whether redistricting using actual figures could be considered a 'retrogression in the position of minorities with respect to [voting].'" (J.S. App. at 11.) Currently under Virginia law, the local jurisdictions in the state have the discretion to choose what data, either

corrected or uncorrected, they use in redistricting. Under Chapter 884, that discretion is eliminated, and Virginia and its local jurisdictions would be required to use one type of census data only – uncorrected data. However, whether this limitation on the choice of data will have a retrogressive effect depends on a set of decisions not yet made.

The Census Bureau has not made a final determination on whether to release the corrected data and will not make this decision until "after it evaluates the quality and accuracy of the [data collection] process." (*Id.* at 12.)[3] As the District Court correctly found, analysis of the potential retrogressive effect of Chapter 884 "need only be conducted if and when the Census Bureau releases adjusted figures. If the Census Bureau does not release adjusted data, Chapter 884 will have no practical effect, and this court would not need to grapple with the issue of whether to define retrogression in terms of adjusted figures." (*Id.* at 11-12.) Therefore, Virginia's Section 5 claim is completely contingent upon "'future events that may or may not occur as anticipated, or indeed may not occur at all,'" *Texas*, 523 U.S. at 300 (citations omitted), and is a "textbook example of a claim that is not ripe for adjudication." (J.S. App. at 12.) *See also Texas*, 523 U.S. at 300 ("Under these circumstances, where 'we have no idea whether or when such [a sanction] will be ordered,' the issue is not fit for adjudication") (citation omitted).

---

[3] This is consistent with past practices. Indeed, the determination extends beyond the Census Bureau. It is the Secretary of Commerce who has the final authority to determine what census data are released. In 1987, the Under Secretary of Commerce informed the Census Director that corrected data would not be released. *City of New York v. Dept. of Commerce*, 822 F.Supp. 906, 914 (E.D.N.Y. 1993). In 1991, the Secretary of Commerce went on television to announce his decision not to correct the census data, and issued a 178 page report giving the reasons for his decision. *Id.* at 917. In short, nothing about the use of corrected data is certain.

As the District Court correctly found, even if the Census Bureau's decision as to what data to use were more certain, Virginia would suffer little, if any, hardship if a Section 5 determination is withheld or delayed to a future date when the contingent events described above may occur and sufficient facts can be developed to make a proper determination. Virginia's failure to obtain a judgment at this point will not prevent the state or local governments from performing redistricting in 2001 using whatever data they prefer. (J.S. App. at 13-14.) Postponing adjudication on this issue will thus not delay Virginia's redistricting or election processes and therefore will cause no harm.

Furthermore, Virginia has enacted Chapter 886, which authorizes the State Board of Election to reschedule the statewide primary election of June 12, 2001 and relax candidate qualifying and other deadlines for state and county elections if redistricting has not been completed and preclearance under Section 5 has not been obtained. (J.S. App. at 13.) Virginia clearly anticipated and prepared for any potential delay in implementation of Chapter 884, and it cannot now maintain that it will be harmed by waiting until the matter is ripe for consideration.

B. Even If It Were Now Certain That the Census Bureau Will Release Statistically Corrected Census Data, Virginia's Claim Would Not Be Ripe.

As noted above, Virginia has the burden of proof to show that the use for redistricting of corrected census data rather than uncorrected data will cause it real harm. In the absence of a demonstration of such harm, Virginia's need is purely hypothetical. To demonstrate that it has standing to raise its claim, Virginia must show that the relief it seeks will make a real difference in its situation. It must show "that there is a 'substantial likelihood' that the relief requested will redress the injury claimed...." *Duke Power*

Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 75 n. 20 (1978) (citations omitted).

In the absence of the census data – both raw and corrected – it is impossible at this time to predict the differences between the two sets of census data. Even if the two population counts are significantly different, the differences may vary from block to block, but the positive or negative variations in an aggregation of blocks may cancel each other out. This is because of the well-known mathematical principle that aggregation tends to hide or smooth variations in the constituent elements. Until we have Virginia's actual census data to analyze – and, more importantly, until Virginia draws districts made up of hundreds of blocks each – we will not know if there is an actual difference between using the corrected and using the uncorrected data.

C. Virginia's Failure To Appeal the Dismissal of Count II Confirms That Its Claim Is Not Ripe.

As noted above, in Count II of its Amended Complaint Virginia asked that the Justice Department be precluded from relying on anything other than uncorrected census data in its Section 5 review of Virginia's redistricting plan. Its counsel noted in his argument to the District Court that even a favorable decision on Virginia's Voting Rights Act claims under Counts I, III, and IV would be a "hollow victory" unless the Justice Department were told, as requested in Count II, that it must compare "apples to apples" – prior uncorrected census data to the most recent uncorrected census data – in reviewing Virginia's redistricting plan. The District Court held that that the Count II claim, like the Voting Rights Act claims in Counts I, III, and IV, was not ripe for adjudication, and Virginia has not appealed that part of the judgment below. It has thus accepted that its claim in Count II is not ripe.

However, that admittedly unripe claim is so closely tied to Virginia's other claims that, as its counsel acknowledged, even a favorable decision on those claims would be a "hollow victory" without a favorable decision on Count II. (Hearing transcript, September 11, 2000, p. 43.) Thus, since Count II is not ripe for decision, the closely related claims that are on appeal are also not ripe for decision.

III. The Merits Of Virginia's Claim Are Not Properly Before This Court.

As Virginia's reversal of direction with regard to its Count II below reveals, this is a case of a litigant seeking rulings to help in future legal disputes with the Department of Justice, rulings that may never need actually be reached. The lack of substantiality in the contentions reveals a classic example of why federal courts do not reach out to decide issues unnecessarily, particularly those of constitutional interpretation.

Virginia devotes three of its four Questions Presented, and the bulk of its argument in its Jurisdictional Statement, as set forth in its Point III, to the merits of its claim that Chapter 884 does not run afoul of Section 5 of the Voting Rights Act. However, the only question that is properly presented by this appeal is whether the District Court erred in holding that Virginia's claim on that point is not now ripe for judicial consideration. The merits of that claim are not properly before this Court. The District Court did not reach those merits, as it dismissed Virginia's claims on the sole ground that they are not ripe for judicial review. (J.S. App. 16.) That dismissal came prior to any pre-trial discovery or any factual hearing in the case, so there is no factual record whatsoever before this Court. Thus, if, contrary to the Intervenors' position, this Court were to accept jurisdiction of Virginia's appeal, the only matter before this Court for consideration on this appeal would be whether the District Court correctly held that Virginia's

claims are not ripe for judicial consideration. Under the well-established practice of this Court, matters that were not addressed by the court below are not considered on appeal here. *E.g., Brandon v. Holt*, 469 U.S. 464, 473 n. 25 (1985).

Virginia argues that, notwithstanding that the District Court did not consider or rule on the merits of Virginia's claims, and had no record on which to do so, this Court may consider the merits of those claims if it concludes that they are ripe for adjudication at this time. In support of that contention Virginia cites one brief footnote from one decision of this Court, *Nixon v. Fitzgerald,* 457 U.S. 731, 743 n. 23 (1982), and a single sentence from a further opinion of this Court, *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985), that simply relies on the footnote in the *Nixon* opinion without discussion or explanation.

The *Nixon* and *Mitchell* cases do not support Virginia's contention that it would be appropriate for this Court to consider the merits of Virginia's claims even though they were not addressed by the District Court and come with no record by which to assess them. The matters on which this Court ruled in the *Nixon* and *Mitchell* cases bear no relation to those on which Virginia asks the Court to rule in this case. Unlike this case, the matter on which this Court ruled in its *Nixon* and *Mitchell* decisions did not involve the merits of the plaintiffs' claims but only the threshold issue whether the defendants, top-level federal officials, were immune from suit for civil damages based on actions performed in the course of their official duties. In its opinion in *Mitchell* this Court made clear that the matter of immunity of a public official from suit is "conceptually distinct from the merits of the plaintiff's claim that his rights have been violated," 472 U.S. at 527-28, and that such an immunity from suit is not a "mere defense to liability" but is an entitlement not to stand trial or face the other burdens of litigation if the official meets the legal

criteria for such immunity. As such, it is akin to a threshold objection to personal jurisdiction. *See Nixon v. Fitzgerald, supra,* at 753-54.

In its opinions in the *Nixon* and *Mitchell* cases this Court indicated that the premature consideration by it of the merits of a plaintiff's claim is quite different from early stage consideration by it of a government official's claim of immunity from suit on a plaintiff's claims. The Court noted that if the latter is not fully considered and finally resolved at an early stage, the case may erroneously be permitted to go to trial and the right to immunity effectively lost. There is no such consequence of permitting the lower courts to fully consider the merits of a plaintiff's claims before this Court intervenes, particularly where, as here, there is as yet no record whatsoever and no consideration by the District Court of the legal or factual issues raised by Virginia's complaint.

In the District Court Virginia moved for summary judgment on all its claims. The United States and the Intervenors opposed that motion, the United States citing a number of disputed issues of material fact that are involved in Virginia's claims. Among such issues, for example, is the issue whether Chapter 884 was enacted by the Virginia Legislature with the intent of "denying or abridging the right to vote on account of race or color," as prohibited by Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. This Court has unsurprisingly held, in another voting rights case involving redistricting by a state legislature, that "the legislature's motivation is itself a factual question." *Hunt v. Cromartie*, 526 U.S. 541, 549 (1999). Until this Court has a factual record on which to assess that and other such factual issues, and findings and rulings by the District Court on such factual issues, as well as the legal issues, this Court is in no position to adequately or properly assess Virginia's statutory arguments and should defer any consideration thereof. Until this Court is able to resolve the statutory

issues raised by Virginia, this Court's "deeply rooted" doctrine that it ought not to pass on questions of constitutionality "unless such adjudication is unavoidable", *e.g.*, *Dep't of Commerce v. U.S. House of Representatives*, 526 U.S. 314, ___, 119 S.Ct. 765, 779 (1999); *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105, 65 S.Ct. 152, 154 (1944), mandates that it also defer any consideration of Virginia's constitutional claims.

CONCLUSION

For the foregoing reasons, the Court should dismiss this appeal or affirm the judgment of the District Court.

Submitted by,

Barbara R. Arnwine
Thomas J. Henderson
Edward Still
Counsel of Record
Lawyers' Committee for Civil Rights Under Law
1401 New York Ave. NW, Suite 400
Washington, DC 20005
(202) 662-8600
fax (202) 783-5130

Marc K. Temin
Verne W. Vance, Jr.
Foley Hoag & Eliot LLP
One Post Office Square
Boston, MA 02109
(617) 832-1000
fax (617) 832-7000

Counsel for Virginia State Conference of the NAACP et al.

Brian S. Currey
Counsel of Record
Thomas M. Riordan
O'Melveny & Myers LLP
400 S. Hope Street
Los Angeles, CA 90071-2899
(213) 430-6000

Karen M. Wahle
O'Melveny & Myers LLP
555 13th Street, NW
Suite 500 West
Washington, DC 20004-1109
(202) 383-5300

Counsel for the City of Los Angeles et al.

J. Gerald Hebert
Law Offices of J. Gerald Hebert
5019 Waple Lane
Alexandria, VA 22304
(703) 567-5873

Paul M. Smith
Counsel of Record
Donald B. Verrilli, Jr.
Kevin Stack
Jenner & Block
601 13th Street, NW
Suite 1200
Washington, DC 20005
(202) 639-6060

Counsel for Marsh et al.

Jacqueline A. Berrien
NAACP Legal Defense & Educational Fund, Inc.
99 Hudson St.
Suite 1600
New York, NY 10013
(212) 965-2200

Neil Bradley
ACLU Southern Regional Office
2725 Harris Tower
233 Peachtree Street, NE
Atlanta, GA 30303
(404) 523-2721

Todd A. Cox
Counsel of Record
NAACP Legal Defense & Educational Fund Inc.
1444 Eye Street, N.W.
10th Floor
Washington, DC 20005
(202) 216-5568

Rebecca Glenberg
ACLU of Virginia
6 North 6th Street
Suite 400
Richmond, VA 23219
(804) 644-8080

Victor M. Glasberg
Kelly M. Baldrate
Victor M. Glasberg & Associates
121 S. Columbus Street
Alexandria, VA 22314
(703) 684-1100

Juan Cartagena
Jennifer Modell
Community Service Society of New York
105 East 22nd Street
New York, NY 10010
(212) 614-5462

Counsel for Smith et al.